Supreme Court, U.S.
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No. 10-____

IN THE

Supreme Court of the United States

JAVIER A. MORENO, JR.
Corporal, United States Marine Corps,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of
Appeals for the Armed Forces

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner was retried by court-martial after eight years of delay attributable to the government. The court-martial found Petitioner had been prejudiced by the inability to locate material defense witnesses and the government's destruction of all of the physical evidence in the case, some of which was potentially exculpatory. Did the lower courts comply with *Barker v. Wingo*, 407 U.S. 514 (1972) and *Doggett v. United States*, 505 U.S. 647 (1992) when, after finding constitutional error, they failed to assess whether the resulting prejudice was harmless beyond a reasonable doubt?

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PETITION FOR A WRIT OF CERTIORARI

Corporal Javier A. Moreno, Jr., United States Marine Corps, respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Armed Forces in this case.

OPINIONS BELOW

The 2010 opinion of the United States Court of Appeals for the Armed Forces (App., *infra*, 1a) is reported at 2010 CAAF LEXIS 124. The 2009 opinion of the Navy-Marine Corps Court of Criminal Appeals (App., *infra*, 2a-45a) is reported at 2009 CCA LEXIS 225. The 2007 opinion of the Navy-Marine Corps Court of Criminal Appeals is reported at 2007 CCA LEXIS 269. The 2006 opinion of the United States Court of Appeals for the Armed Forces (App., *infra*, 46a-102a) is reported at 63 M.J. 129. The 2004 opinion of the Navy-Marine Corps Court of Criminal Appeals is reported at 2004 CCA LEXIS 118.

JURISDICTION

The decision of the United States Court of Appeals for the Armed Forces was entered on February 4, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. § 1259(3).

STATEMENT OF THE CASE

A. Proceedings before Petitioner's 1999 court-martial.

Petitioner and his co-accused, Corporal Cain Oriade, were accused of drugging another Marine, Lance Corporal [E], with a still unidentified date-rape drug that reportedly caused her to immediately lose consciousness after taking one sip of the unknown substance, which the government alleged had been placed in Lance Corporal [E]'s beer. After Lance Corporal [E] lost consciousness, the two men allegedly raped her in Petitioner's barracks room. Corporal Oriade was acquitted at his court-martial in May 1999. On September 30, 1999, Petitioner was found guilty at a general court-marital of rape in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920. App., *infra*, at 5a. On May 13, 2004, the Navy-Marine Corps Court of Criminal Appeals (NMCCA) affirmed the findings and sentence as approved by the convening authority. *Id.*

B. Proceedings before the Court of Appeals for the Armed Forces on Petitioner's 1999 court-martial.

The Court of Appeals for the Armed Forces (CAAF) granted review of the case, and on May 11, 2006, set aside the findings and the sentence. App., *infra*, at 79a. CAAF found that the military judge had erred in denying the challenge for cause of a member who had investigated the incident in

question, and who had subsequently followed the case in the press. *Id.* at 55a. CAAF concluded that an objective observer would not accord much weight to the member's assertion that he could be impartial, holding that there was a substantial doubt that the members were fair and impartial. *Id.*

Additionally, CAAF found that the length of the delay in the post-trial processing of Petitioner's case and the lack of any constitutionally-justifiable reasons for the delay amounted to a denial of Petitioner's due process right to speedy review and appeal. *Id.* at 71a. CAAF set aside the findings and sentence and authorized a rehearing, but noted that dismissal could be appropriate "if the delay either impaired Moreno's ability to defend against the charge at a rehearing or resulted in some other evidentiary prejudice." *Id.* at 78a. CAAF added in a footnote:

> We are mindful of the difficulty that an appellant and his appellate defense counsel may have at this juncture of the process in identifying problems that would hinder an appellant's ability to present a defense at rehearing. If an appellant does experience problems in preparing for trial due to the delay, a Sixth Amendment speedy trial motion could appropriately be brought at the trial level. We are inclined to believe that a consideration of the Sixth Amendment speedy trial right in its most pristine

sense would be triggered by any retrial of such a person. *Id.* at 71a.

C. Proceedings before Petitioner's 2007 court-martial.

The government elected to retry Petitioner. On April 16, 2007, the government filed an interlocutory appeal of the military judge's pretrial ruling that excluded certain evidence relating to the government's theory that Petitioner and the co-accused drugged the alleged victim. App., *infra*, at 6a. On July 19, 2007, NMCCA affirmed the ruling of the military judge. *Id.*

The trial resumed on November 5, 2007. *Id.* at 7a. At his rehearing, Petitioner filed a motion to dismiss the charge and specification in accordance with CAAF's earlier decision.

A Heineken beer bottle seized by the Naval Criminal Investigative Service (NCIS) from Petitioner's room tested negative for date-rape drugs when originally analyzed. In fact, the only drug found in the beer bottle was naproxen, an anti-inflammatory medication sold under the name "Aleve." Dr. Carol O'Neal, a forensic toxicologist, testified that the naproxen in the bottle could have been transferred from the saliva of the person drinking the beer, a process commonly referred to as "backwash." Lance Corporal [E]'s medical records reflect that, at the time of her allegations, she had recently been given a prescription for naproxen. There is no evidence that either Petitioner or Corporal Oriade were taking naproxen on the night

in question. Although NCIS took blood, saliva, and urine samples from Petitioner, Corporal Oriade and Lance Corporal [E], none of these fluids were tested for the presence of naproxen. No subsequent tests were performed to attempt to conclusively identify who drank from the beer bottle, and the beer bottle was subsequently destroyed.

In fact, all of the physical evidence in this case, including the samples of bodily fluids taken from Petitioner, Corporal Oriade and Lance Corporal [E], was destroyed in 2001 – before CAAF even originally heard this case. Dr. O'Neal testified that if the government had not destroyed the samples of bodily fluid, she could have tested the samples for the presence of naproxen and other potential date-rape drugs that had not been tested for in 1999.

Dr. O'Neal further testified that the testing available in 1999 would likely have detected all potential date-rape drugs in Lance Corporal [E]'s urine. Even drugs that are quickly metabolized in the body, such as GHB, would most likely have been detected given the large dose that Lance Corporal [E] would have to had ingested to cause the symptoms she described. Lance Corporal [E] described passing out within seconds of drinking the beer. Dr. O'Neal described this account by Lance Corporal [E] as "highly unlikely . . . . I don't know of any drug or chemical that can cause those effects with an oral administration that quickly."

During the sexual assault examination of Corporal Oriade, NCIS agents photographed fresh hickey marks on Corporal Oriade's neck. These

photographs were also destroyed by the government in 2001.

The military judge denied Petitioner's motion to dismiss. He specifically found that the physical evidence from the sexual assault kits in the case had been destroyed; that the NCIS investigator notes had been destroyed; that the government and defense were unable to locate or were having difficulty in locating eyewitnesses to some of the events of May 1, 1999; and that photographs of hickey marks given to Corporal Oriade by Lance Corporal [E] had also been lost or destroyed.

The military judge acknowledged the destruction of evidence in this case and the increased difficulty of presenting a defense. He concluded "[t]he defense has shown some general prejudice as well as some specifics. However, on the whole and in consideration of all the *Barker* factors, the court finds that the accused has not met . . . his burden of establishing a constitutional violation by preponderance of the evidence, and the motion is denied." App., *infra*, at 9a; *see Barker v. Wingo*, 407 U.S. 514, 530 (1972).

The military judge then balanced this specific prejudice with the other *Barker* factors and held that Petitioner had failed to establish a constitutional violation by a preponderance of the evidence, and the military judge denied the motion. The military judge did not articulate which of the three remaining *Barker* factors, which the CAAF had already determined either weighed in Petitioner's favor or weighed only slightly against Petitioner, balanced

against the newly-found specific prejudice to Petitioner.

Petitioner renewed his motion to dismiss at several stages of the trial as the prejudice resulting from the delay became more evident. Two military policemen were the first to respond to Lance Corporal [E]'s allegations of rape. These witnesses could not be located at the time of Petitioner's 2007 court-martial and are known only from their investigative notes as Staff Sergeant D. M. Morgan and Staff Sergeant Q. L. Smith. According to Staff Sergeant Morgan's notes, Lance Corporal [E] told him that she had been escorted back to Barracks 473 with "five male friends." Once there she described being in and out of consciousness in the third deck lounge. When she awoke she found the five males doing something. She told him that she spoke in a "demon voice" to try and scare them away. NCIS Special Agent Blane testified that the third deck lounge was secured as a crime scene when he arrived at the barracks that morning. Staff Sergeant Smith's notes reflect why it had been secured: "3rd deck lounge was secured as C/S as directed by R/I due to V/[E] initially claiming she was assaulted in the 3rd deck lounge." According to the notes, Lance Corporal [E] terminated the interview with the military policemen until she could speak with Chaplain James N. Edwards. After she emerged from her meeting with Chaplain Edwards, the military policemen had left, and she relayed her allegation that she had walked home with three male Marines, and that two of them had drugged and raped her in Petitioner's barracks room.

When litigating the witness production of Staff Sergeant Morgan, Petitioner noted that Staff Sergeant Morgan's investigator notes were not available when the original Sixth Amendment motion was argued, and now the defense did not know the whereabouts of Staff Sergeant Morgan. The military judge found that Petitioner failed to meet his burden of providing relevant contact information for Staff Sergeant Morgan and denied his production. The military judge did, however, note that arguments about Petitioner's inability to locate Staff Sergeant Morgan were preserved for Petitioner's Sixth Amendment argument.

Again, before argument on the merits, Petitioner renewed the Sixth Amendment motion, pointing out the unavailability of witnesses. He also argued that the destruction of the beer bottle prevented Petitioner from affirmatively establishing whether that bottle was the one from which Lance Corporal [E] drank, and, consequently, whether there was any evidence that her beer was spiked with then-known or subsequently-discovered date-rape drugs.

The military judge found that Petitioner had developed the record throughout the trial regarding prejudice sustained, but found that the court had taken actions to adequately ameliorate the prejudice. The military judge then noted that the government was also prejudiced by the delay, and did not disturb his earlier ruling.

On November 9, 2007, Petitioner was found guilty of rape in violation of Article 120, UCMJ, in a trial by jury with enlisted representation. Petitioner

was sentenced to reduction to paygrade E-1, total forfeitures of his pay and allowances, confinement for seven years, and a dishonorable discharge.

On February 25, 2008, the convening authority approved only the dishonorable discharge in accordance with the previous decision of CAAF.

D. Proceedings before the Navy-Marine Corps Court of Criminal Appeals and the Court of Appeals for the Armed Forces on Petitioner's 2007 court-martial.

NMCCA affirmed the findings and sentence. App., *infra*, at 45a. In its opinion, the Court failed to assess whether the prejudice suffered as a result of the government's delay of Petitioner's court-martial was harmless beyond a reasonable doubt. The court concluded that the prejudice found by the court-martial was "minimal and, in most instances, mitigated by the military judge's decisions and rulings." *Id.* at 18a. Petitioner petitioned CAAF for review on August 21, 2009. CAAF summarily affirmed NMCCA's decision on February 4, 2010. *Id.* at 1a.

REASON FOR GRANTING THE PETITION

Having already found constitutional error in an earlier decision, the lower courts failed to adhere to this Court's precedent when they failed to later assess whether further prejudice found by

Petitioner's court-martial was harmless beyond a reasonable doubt.

This Court reviews speedy trial issues, *de novo*. However, when the CAAF considered Petitioner's original trial on appeal, it found that the length of the delay in the post-trial processing of Petitioner's case and the lack of any constitutionally-justifiable reasons for the delay amounted to a denial of Petitioner's due process right to speedy review and appeal. App., *infra*, at 71a. The Court set aside the findings and sentence due to the military judge's erroneous denial of a challenge for cause and authorized a rehearing. *Id.* at 55a, 79a. But having already found that the Petitioner was "denied his due process right to speedy review and appeal," it noted that dismissal could be appropriate "if the delay either impaired Moreno's ability to defend against the charge at a rehearing or resulted in some other evidentiary prejudice." *Id.* at 71a, 78a. The Court added that it was "mindful" of the problems Moreno could face in presenting his defense at rehearing and that "a consideration of the Sixth Amendment speedy trial right in its most pristine sense would be triggered by any retrial of such a person." *Id.* at 71a.

CAAF had already determined that Petitioner was denied Due Process before the rehearing even began. This Court's precedent, therefore, required the lower courts to determine whether the constitutional violation in this case was harmless beyond a reasonable doubt. Importantly, the government never contested this Court's finding of a constitutional violation in this case and that ruling is now the law of the case. After the rehearing,

NMCCA's analysis thus should have been confined to determining whether the prejudice was harmless beyond a reasonable doubt.

But even if a full *de novo* review of the *Barker* factors is appropriate, as found by the lower court, further relief in the form of dismissal is still appropriate. The four *Barker v. Wingo* factors are: (1) the length of the delay; (2) the reasons for the delay; (3) the petitioner's assertion of the right to timely review and appeal; and (4) prejudice. 407 U.S. at 530 (1972). 2596 days, or seven years, one month, and nine days, elapsed between the conclusion of Petitioner's first trial and the start of his rehearing. The production of the evidence on the merits didn't begin for another 362 days. The vast majority of this delay is attributable to the government's failure to adequately staff the appellate defense division, which led CAAF to conclude that the second *Barker* factor "weighs heavily in favor of Moreno." App., *infra*, at 63a. CAAF held that Petitioner's failure to assert his due process right until late in his appeal weighed slightly against Petitioner. *Id.* at 64a. A *de novo* balancing of the *Barker* factors reveals three factors that weigh heavily in Petitioner's favor and only one that weighs slightly against him.

This case presents the deprivation of the Sixth Amendment speedy trial right "in its most pristine sense . . . ." *See* App., *infra*, at 71a. Impairment of one's defense is the most difficult form of speedy trial prejudice to prove because time's erosion of exculpatory evidence and testimony can rarely be demonstrated. Yet, in this case, the military judge

established that, while Petitioner was being oppressively incarcerated, evidence and witnesses were steadily disappearing. This prejudice became even clearer during the contested portion of the trial. For instance, Petitioner could no longer subject Lance Corporal [E]'s blood samples to further chemical analysis to rebut the government's claim that Petitioner and Corporal Oriade could have used undetectable date-rape drugs. Without a theory of being drugged, Lance Corporal [E]'s allegation is unbelieveable. Additionally, Staff Sergeant Morgan, one of the first law-enforcement responders, and the first investigator to speak with Lance Corporal [E], was never found. His investigator notes reflect an allegation by Lance Corporal [E] that differs from her later testimony. The defense was not able to call him to highlight her inconsistency. "Imposing those consequences on anyone who has not yet been convicted is serious."

In *Doggett v. United States*, this Court found a Sixth Amendment violation where eight years and six months elapsed between Doggett's arrest and indictment, even though Doggett failed to demonstrate actual prejudice to his trial. 505 U.S. 647, 654-57 (1992). On remand, the 11th Circuit ordered the District Court to set aside and vacate Doggett's conviction. *Id.* at 658. In this case, where eight years and one month elapsed between Petitioner's initial trial and the production of evidence at his rehearing, and where there exists specific prejudice to Petitioner, the Sixth Amendment requires a dismissal of the charges.

NMCCA began its analysis by noting its belief that Petitioner's Fifth Amendment due process claim had been addressed by CAAF's earlier decision and thus focused its analysis solely on Petitioner's Sixth Amendment claim. App., *infra*, at 10a. The lower court went further than CAAF did in Moreno, finding "the first three [*Barker*] factors weigh in favor of the petitioner and, consequently, we will evaluate whether the petitioner was prejudiced by the delay." *Id.* at 11a.

At no point did NMCCA indicate it was reviewing the record to determine whether, under the totality of the circumstances, the constitutional violation in this case was harmless beyond a reasonable doubt. Instead, NMCCA noted the military judge's finding that Petitioner "had demonstrated general and specific prejudice; however, any such prejudice was minimal and, in most instances, mitigated by the military judge's decisions and rulings." *Id.* at 18a. But the Constitution does not require constitutional violations be mitigated "in most instances." It requires that these violations be harmless beyond a reasonable doubt. Nor did the NMCCA explain how, with three of the four *Barker* factors weighing in Petitioner's favor, a finding of "general and specific" prejudice, even if mitigated in most but not all instances, did not result in both a deprivation of due process and a denial of a speedy trial. As outlined above, the prejudice to Petitioner in the form of destroyed evidence and absent witnesses was a constitutional violation in its most pristine sense and requires dismissal of the charges.

This Honorable Court should grant Petitioner's petition because the lower court has decided a question of law in a way in conflict with applicable decisions of this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES v. Javier A. MORENO, Jr.,
Corporal, U.S. Marine Corps
No. 04-0698

UNITED STATES COURT OF
APPEALS FOR THE ARMED
FORCES

2010 CAAF LEXIS 124

Decided February 4, 2010

DECISION WITHOUT PUBLISHED OPINION

OPINION

On consideration of the petition for grant of review of the decision of the United States Navy-Marine Corps Court of Criminal Appeals, said petition is hereby granted, and, the decision of the United States Navy-Marine Corps Court of Criminal Appeals is affirmed.

APPENDIX B

UNITED STATES OF AMERICA v. JAVIER A. MORENO, JR., CORPORAL (E-4), U.S. MARINE CORPS

NMCCA 200100715

UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

2009 CCA LEXIS 225

June 23, 2009, Decided

COUNSEL:

For Appellant: LT William Stoebner, JAGC, USN.

For Appellee: LCDR Paul Bunge, JAGC, USN.

JUDGES: Before R.E. VINCENT, E.C. PRICE, J.E. STOLASZ, Appellate Military Judges. Judge PRICE and Judge STOLASZ concur.

OPINION BY: R.E. VINCENT

OPINION OF THE COURT

VINCENT, Senior Judge:

A general court-martial, composed of officer and enlisted members, convicted the appellant, contrary to his pleas, of rape, in violation of Article 120, Uniform Code of Military Justice, 10 U.S.C. § 920. The appellant was sentenced to confinement for seven years, forfeiture of all pay and allowances, reduction to pay grade E-1, and a dishonorable discharge. The convening authority approved the findings, but approved only the portion of the sentence pertaining to the dishonorable discharge.[1]

We have carefully reviewed the record of trial, the appellant's seven assignments of error (AOE),[2]

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[1] The Court of Appeals for the Armed Forces (CAAF) limited the maximum approved to a punitive discharge. *United States v. Moreno*, 63 M.J. 129, 144 (C.A.A.F. 2006).

[2] I. THE MILITARY JUDGE RULED THAT CPL MORENO HAD BEEN PREJUDICED BY THE DEPRIVATION OF DUE PROCESS THAT OCCURRED IN HIS CASE WHERE THE GOVERNMENT HAD DESTROYED OR LOST EXCULPATORY EVIDENCE AND WAS UNABLE TO LOCATE WITNESSES TO THE ALLEGED CRIME IN 1999. DID THE MILITARY JUDGE ERR IN NEVERTHELESS CONCLUDING THAT THE DEPRIVATION OF DUE PROCESS AND SPEEDY TRIAL DID NOT WARRANT DISMISSAL?
II. WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE DE-NIED THE DEFENSE CHALLENGE FOR CAUSE AGAINST CAPT M, WHO HAD A "VERY CLOSE" COUSIN WHO WAS THE

the Government's response, and the appellant's reply. We conclude that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

VICTIM OF A RAPE IN WHICH THE PERPE-TRATOR WAS NEVER BROUGHT TO JUS-TICE?

III. WHETHER CPL MORENO WAS DE-PRIVED OF HIS FIFTH AND SIXTH AMEND-MENT RIGHT TO CALL RELEVANT WIT-NESSES WHOSE TESTIMONY WOULD BE NECESSARY AND MATERIAL TO THE PRESENTATION OF HIS DEFENSE?

IV. WHETHER THE MILITARY JUDGE ERRED IN DENYING CPL MORENO'S MO-TION TO REOPEN THE ARTICLE 32 INVES-TIGATION WHEN THE EVIDENTIARY LANDSCAPE HAD SIGNIFICANTLY CHANGED IN THE INTERVENING SEVEN YEARS BETWEEN THE ORIGINAL ARTICLE 32 AND THE REHEARING?

V. WHETHER THE EVIDENCE IS FAC-TUALLY SUFFICIENT TO SUPPORT THE CONVICTION?

VI. WHETHER CPL MORENO'S SIXTH AMENDMENT RIGHT TO COUNSEL WAS VIOLATED WHEN THE MILITARY JUDGE DENIED CPL MORENO'S MOTION TO COMPEL THE GOVERNMENT TO PROVIDE LT MIZER AS HIS DEFENSE COUNSEL EVEN THOUGH CPL MORENO HAD A TWO-AND-A-HALF YEAR, ONGOING AT-TORNEY-CLIENT RELATIONSHIP WITH LIEUTENANT MIZER, WHO HAD ORIGI-NALLY BEEN DETAILED AS APPELLATE DEFENSE COUNSEL?

VII. WHETHER A GENERAL COURT-MARTIAL WITH A PANEL COMPRISED OF LESS THAN 6 MEMBERS VIOLATED CPL MORENO'S RIGHT TO DUE PROCESS?

Background

On 29 September 1999, the appellant was tried and convicted of raping Lance Corporal (LCpl) [E] on or about 1 May 1999 in Okinawa, Japan. He was sentenced to six years confinement, forfeiture of all pay and allow-ances, reduction to pay grade E-1 and a dishonorable discharge. On 13 May 2004, this court affirmed the findings and sentence. *United States v. Moreno,* No. 200100715, 2004 CCA LEXIS 118 (N.M.Ct.Crim.App. 13 May 2004). Subsequently, on 11 May 2006, the Court of Appeals for the Armed Forces (CAAF) set aside the findings and sentence after holding the military judge erred in denying a defense challenge for cause against a member of the court-martial. A rehearing was author-ized. *United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006).

In addition to ruling on the challenge for cause issue, the CAAF also held the appellant had been denied speedy post-trial review in violation of his Fifth Amendment right to due process. *Id.* at 141. The CAAF considered dismissing the charge and specification at that time, stating, in part, "[d]ismissal would be a consideration if the delay either impaired Moreno's ability to defend against the charge at a rehearing, or resulted in some other evidentiary prejudice." *Id.* at 143. Nevertheless, the CAAF found no such evidence in the record and did not dismiss the charge.

On 31 October 2006, Commanding General, Marine Corps Base, Camp Smedley D. Butler, Okinawa, Japan, directed a rehearing. The appellant was arraigned at a rehearing in Okinawa, Japan, on 8 November 2006. Sub-sequent Article 39(a), UCMJ,

sessions were held in Okinawa on 1 December 2006, 3 January 2007 and 27 March 2007. On 13 February 2007, after considering the Government's Motion for Appropriate Relief seeking a change of venue and the appellant's trial defense coun-sel's written notation that he did not oppose the motion, the military judge, Colonel (Col) B.D. Landrum, USMC, granted the Government's motion to move the appellant's general court-martial to Quantico, Virginia. Appellate Exhibit XII. Subsequently, the appellant's case was transferred to the Northern Judicial Circuit for trial at Marine Corps Base, Quantico, Virginia.[3]

Following an Article 39(a), UCMJ, session on 16 April 2007, the Government filed an interlocutory appeal under Article 62, UCMJ, and the court-martial proceedings were stayed pending our decision. The Government challenged the military judge's ruling, which excluded expected Government evidence and argument relating to the possibility that the appellant administered a "date rape" drug to the victim on the night of the alleged rape. On 19 July 2007, we denied the Government's interlocutory appeal. *United States v. Moreno*, No. 200100715, 2007 CCA LEXIS 269, unpublished op. (N.M.Ct.Crim.App. 19 Jul 2007).

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[3] Although Col Landrum ordered the change of venue on 13 February 2007, he presided over an Article 39(a), UCMJ, session held in Okinawa on 27 March 2007. Record at 87-164. The Chief Judge of the Navy-Marine Corps Trial Judiciary specifically detailed Col Landrum to the appel-lant's case in order to conduct this Article 39(a) session. *Id.* at 87-89.

On 8 May 2007, the appellant filed a petition for extraordinary relief in the nature of a writ of mandamus, contending that he had been denied a speedy trial, and requesting that we order the Government to dismiss, with prejudice, the charge and specification pending against him. On 16 July 2007, we denied the petition "without prejudice to the petitioner's right to raise the issue before this court in the normal course of appellate review." *Moreno v. United States*, No. 200100715, unpublished op. (N.M.Ct.Crim.App. 16 Jul 2007).

From 5-9 November 2007, the appellant was retried and convicted of rape.

I. Speedy Trial

In his first assignment of error, the appellant contends the military judge erred in denying his right to a speedy trial because his ability to present a defense had been impaired. We disagree.

Military Judge's Ruling

Prior to the rehearing, the appellant filed a pretrial motion seeking dismissal of the charge and specification with prejudice based upon a denial speedy trial. AE VIII. During an Article 39(a), UCMJ, session held on 17 April 2007, the military judge denied the motion. Record at 272-73. In denying the motion, the military judge indicated that he applied "the *Barker versus Wingo* factors in the context of the" CAAF opinion in Moreno. While he considered all four factors, the military judge's findings of fact primarily focused on the fourth factor, prejudice to the appellant.

The military judge adopted the summary of facts contained in the appellant's motion, which outlined the procedural history of the appellant's initial court-martial. AE VIII. He also made the following findings of fact and conclusions of law:

> In addition the court also finds that all of the physical evidence obtained from the sexual assault examination of Corporal Moreno, Lance Corporal [O], and Lance Corporal [E] is no longer available.
>
> Investigator notes have been destroyed and are no longer available.
>
> The defense team's ability to conduct their own independent investigation has been hampered, specifically the ability to conduct a timely investigation of the Globe and Anchor Club, the ability to simply go to the barracks and interview the Marines who lived there. Obviously, they can go to the barracks now, but dif-ferent Marines live there now. It would have before [sic] much easier back in 1999.
>
> There is an increased difficulty in locating and interviewing witnesses, for example, Lance Corporal Wanzar [sic].

> There has also been a loss or destruction of photos or other corroborating evidence related to photographs of hickie (sic) marks on Lance Corporal [O] that would impeach the contradiction - - impeach by contradiction the testimony of the alleged victim.
>
> As in nearly all rehearings, there is some degree of prejudice associated with this delay. The defense has shown some general prejudice as well as some specifics. However, on the whole and in consideration of all the *Barker* factors, the court finds that the accused has not met . . . his burden of establishing a constitutional violation by preponderance of the evidence, and the motion is denied. Record at 272-73.

After both sides rested, the appellant's trial defense counsel renewed his speedy trial motion. He reiterated his earlier assertions that the lost evidence precluded testing of the appellant's, the victim's, and LCpl [O]'s blood. He also asserted that witnesses, including LCpl Wanzer and Mr. Hademik, were unavailable to testify for the defense. *Id.* at 697-700.

In denying the renewed request, the military judge again acknowledged "there is a certain amount of prejudice at any . . . rehearing, there is no such thing as a perfect trial in terms of having all

evidence available" and noted that the court has attempted to "ameliorate any prejudice". *Id.* at 700-01.

Legal Requirements

The appellant asserts that the CAAF determined that he had "been denied Due Process before the rehearing even began." Appellant's Brief of 16 Jun 2008 at 26. In the appeal of his initial court-martial, the CAAF addressed the appellant's Fifth Amendment due process right to speedy post-trial review. *Moreno*, 63 M.J. at 135, 141. Regarding his Sixth Amendment right to a speedy trial, the CAAF noted that consideration of such a motion would "be an ad hoc determination based on the four factors of *Barker*." *Id.* at 141 n.19 (internal quotation marks and citation omitted).

We apply a de novo standard of review concerning the legal question of whether an accused received a speedy trial. *United States v. Cooper*, 58 M.J. 54, 57-58 (C.A.A.F. 2003). "Underlying findings of fact are given substantial deference and will be reversed only for clear error." *Id.* at 58 (internal quotation marks and citation omitted). We have reviewed the military judge's findings of fact, and finding no clear error, adopt them as our own.

Further, we are mindful that the four factors in determining whether a Sixth Amendment speedy trial violation has occurred provide an apt structure for examining the facts and circumstances surrounding an alleged Article 10 and Sixth Amendment speedy trial violation. *Cooper*, 58 M.J. at 61. These four factors are: (1) length of the delay;

(2) reasons for the delay; (3) assertion of the right to a speedy trial; and (4) prejudice. *United States v. Birge*, 52 M.J. 209, 212 (C.A.A.F. 1999)(citing *Barker v. Wingo*, 407 U.S. 514, 530, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972)).

Taking into consideration the extensive history of this case since 1 May 1999, we conclude that the first three factors weigh in favor of the appellant and, consequently, we will evaluate whether the appellant was prejudiced by the delay.

Prejudice should be assessed in the light of the appellant's interests, which the speedy trial right was designed to protect. The Supreme Court has identified three such interests: (1) to prevent oppressive pretrial incarceration; (2) to minimize the appellant's anxiety and concern; and (3) to limit the possibility that the defense will be impaired. Of these, the most serious is the last, be-cause the inability of an appellant to adequately prepare his case skews the fairness of the entire system. *Barker*, 407 U.S. at 532.

The appellant was not in pretrial confinement and, furthermore, in accordance with the CAAF's decision in Moreno,[4] the appellant was aware prior to the rehearing that he could not receive any further confinement. In his motion to dismiss for lack of a speedy trial and on appeal, the appellant does not particularize anxiety or concern distinguishable from the normal anxiety experienced by servicemembers facing a rehearing, and we do not find any in our review of the record.

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[4] 63 M.J. at 144.

As noted above, in denying the motion to dismiss for lack of a speedy trial, the military judge provided findings of fact and indicated that the appellant had demonstrated general and specific prejudice. Recognizing that these determinations were made prior to presentation of evidence in this case, we have reviewed the record of trial and provide the following additional findings of fact and legal analysis for each instance of alleged specific prejudice.

Destroyed Evidence

As previously noted, the military judge excluded certain items of expected Government evidence related to the possibility the victim was drugged by the appellant on the night of the alleged rape and prohibited the Government from arguing the appellant administered a "date rape" drug to the victim. We denied the Government's interlocutory appeal of the military judge's ruling excluding this evidence.

The appellant asserts that destruction of toxicology samples from the victim, serology samples from the appellant, victim and LCpl [O], and a beer bottle seized by law enforcement officials from the appellant's barracks room on the night of the incident, prevented him from conducting additional chemical analysis of the samples and bottle. The appellant contends that additional chemical analysis was necessary to rebut the Government's theory that the appellant and LCpl [O] could have used date-rape drugs in order to incapacitate the victim. Appellant's Brief at 27.

We note that the toxicology report and serology re-port results were admitted into evidence at trial. Prosecution Exhibits 18 and 19. The toxicology report indicated that ethanol (alcohol) was present in the victim's blood and ethanol and two decongestants were present in her urine. Neither the toxicology nor serology reports indicated the presence of any date-rape drug.

At trial, the victim testified that she consumed a beer provided to her by the appellant while in his barracks room, lost consciousness, and then awoke to find the appellant and then LCpl [O] raping her. Record at 400-02. In our opinion, her testimony complied with the military judge's ruling that she could testify as to her perceptions of events, but could not tie her perceptions to the conclusion that she was drugged. *Id.* at 262-67. Our re-view of the record convinces us that the Government complied with the military judge's order and did not put on any evidence in its case in chief indicating that the appellant might have drugged the victim.

Dr. O'Neal, a forensic toxicologist, testified as an expert witness for the appellant. *Id.* at 564-82. She confirmed that the toxicology report tested for, but did not detect, the presence of date-rape drugs, including Gamma-Hydroxybutyrate (GHB). *Id.* at 569. She also testified that if the serum and urine samples had not been destroyed, they could have been tested for the presence of other potential date-rape drugs not tested for in 1999. *Id.* at 573, 577-78.

Additionally, Dr. O'Neal confirmed that the drug chemical report conducted on the seized beer bot-tle indicated that an extract found in the bottle

revealed the presence of naproxen. *Id.* at 571-72; Defense Exhibit I. She also testified that the victim's testimony that she lost consciousness immediately after consuming a beer was "highly unlikely and nearly improbable." *Id.* at 568.

In rebuttal, the Government called Dr. O'Neal as its own expert witness. She testified that a negative date-rape test result does not "mean that there was no drug present. It depends on what the drug is and when the sample was collected." *Id.* at 675. She further testified that a heavy dose of GHB, a date-rape drug, could cause a person to lapse in and out of consciousness. *Id.* at 678. However, if such a large dose of GHB was administered, it was "more likely" to find the presence of GHB in a urine sample even if the sample was taken 6-7 hours after being administered to the person. *Id.* at 679-80. Finally, she again noted that victim's tests results were negative for GHB and that there is no direct evidence that any date-rape drug was involved in this case. *Id.* at 678, 681.

It is apparent that the appellant, through the testimony of Dr. O'Neal, his expert witness, was able to impeach the credibility of the victim's testimony that she lost consciousness immediately prior to the rape. Her testimony confirmed the absence of any date-rape drugs in the victim's blood or urine. Moreover, she testified that, it would require a large dose of a date-rape drug, such as GHB, to cause a person to quickly lose consciousness, and she would expect to detect the presence of a date-rape drug in the person's urine.

Based on Dr. O'Neal's testimony, further testing of the destroyed samples might have ruled out the presence of other date-rape drugs and testing of the beer bottle might have revealed the presence of naproxen. However, the military judge's ruling did not permit the Government to offer any evidence that the appellant might have drugged the victim before raping her. The appellant raised the date-rape drug issue and, in so doing, provided evidence that no date-rape drugs were detected in the victim's blood or urine. Furthermore, the appellant presented expert witness testimony that impeached, by contradiction, the victim's testimony that she lost consciousness after consuming a beer provided to her by the appel-lant.

We conclude that the appellant's ability to impeach the victim's testimony and present a defense were not impaired by destruction of the toxicology and serology samples and the beer bottle.

Investigative Notes

The Government stipulated that, although law enforcement investigative notes were available at the first trial, they had subsequently been destroyed. *Id.* at 189. Additionally, Naval Criminal Investigative Service (NCIS) Special Agent (SA) Carlin testified that NCIS investigations are "routinely destroyed after a couple of years." *Id.* at 485. However, we note that SA Carlin and SA Blane, both of whom investigated the rape allegation against the appellant in 1999, testified at the rehearing. *Id.* at 484-524. The appellant's trial defense counsel was provided an opportunity to cross-examine both wit-

nesses. Our review of the cross-examination reveals that the trial defense counsel did not question either witness concerning the location or contents of their investigative notes. We find the appellant's assertion that the agents' investigative notes may contain exculpatory or possible impeachment evidence speculative and unpersuasive without any attempt to pursue these issues with the wit-nesses who prepared the notes.

We note that the investigative notes belonging to Mr. D. M. Morgan, a former Marine Corps staff sergeant and law enforcement officer, are addressed in AOE III.

Photographs of Hickey Marks

On 1 May 1999, NCIS agents took photographs of LCpl [O], depicting fresh bite or "hickey" marks on his neck. Since the Government had destroyed or lost these photographs after the first trial, the parties entered into a Stipulation of Fact admitting the presence of the marks on LCpl [O]'s neck. *Id.* at 203. The Stipulation of Fact was subsequently provided to the members. *Id.* at 662-64; DE K. Accordingly, we conclude that the substitute evidence did not impair the appellant's ability to impeach the victim's testimony and present his defense.

Witness Requests

During a 27 March 2007 Article 39(a), UCMJ, session, the military judge denied the appellant's Motion for Production of LCpl Wanzer after noting that the defense had conceded that her testimony

was cumulative with that of another witness, Santiago Cordova, ordered produced by the military judge. AE XXXI at 3; Record at 161-62. We note Mr. Cordova testified for the defense. Record at 583-91. We conclude that the military judge did not abuse his discretion because (1) the appellant conceded that LCpl Wanzer's testimony was cumulative and (2) the absence of her testimony did not prejudice the appellant.

The Government granted the appellant's request for the production of Mr. John Hademik. AE XV at 10. The defense rested its case on 7 November 2007 without calling Mr. Hademik as a witness. During an Article 39(a), UCMJ, session held the next day, LT Mizer, the appellant's trial defense counsel, first notified the military judge that Mr. Hademik had failed to comply with a subpoena to appear as a witness. Record at 700. The military judge noted that the appellant had not previously raised this issue before the court and agreed with the Government's argument that the appellant had not requested a writ of attachment to compel Mr. Hademik's attendance at trial. *Id.*

Our review of the record of trial convinces us that the appellant had not previously informed the military judge that Mr. Hademik had failed to appear for trial nor requested a writ attachment under R.C.M. 703(e)(2)(G). We conclude that the appellant's failure to raise this issue before the military judge in a timely manner and failure to request a writ of attachment constituted waiver of the issue.

Based on our review of the entire record of trial, we have determined that the appellant's defense at the rehearing was not impaired. The military judge acknowledged the appellant demonstrated general and specific prejudice; however, any such prejudice was minimal and, in most instances, mitigated by the military judge's decisions and rulings. We conclude that the fourth *Barker* factor, prejudice, does not weigh in favor of the appellant and, furthermore, that he was not denied his Sixth Amendment right to a speedy trial.

II. Challenge for Cause

The appellant alleges the military judge abused his discretion when he denied the defense's challenge for cause of Captain (Capt) [M], who disclosed during voir dire that she had a close relationship with a cousin who was a rape victim. The appellant argues that the military judge failed to apply the liberal grant mandate and, there-fore, failed to address implied bias when he denied the challenge for cause against Capt [M]. We disagree.

Background

During general voir dire, Capt [M] answered affirmatively that she had a relative or close friend who had been the victim of a sexual assault. When she re-turned for individual voir dire, the following exchanges took place:

> MJ: Okay. You answered affirmatively that you have a relative or a co-worker or a close personal friend that's been a

victim of a sexual assault; is that right?

MEM (Capt [M]): That is correct, sir.

MJ: Can you tell us about that please.

MEM (Capt [M]): My cousin was raped in college.

MJ: Your cousin was raped in college. And how close were you to your cousin?

MEM (Capt [M]): I'm very close to her, sir.

MJ: Okay. And what is the age difference?

MEM (Capt [M]): Five years, sir.

MJ: She is...

MEM (Capt [M]): Younger.

MJ: Younger. And is this - did she share with you - you don't have to tell us about the experience, but did she share in detail what happened to her?

MEM (Capt [M]): She did, sir. It was never - it never went to trial, sir.

MJ: Okay. But she shared that experience with you?

MEM (Capt [M]): Yes, sir.

MJ: At the time or some...

MEM (Capt [M]): At the time, sir.

MJ: At the time. But it never went to trial?

MEM (Capt [M]): No, sir.

MJ: Do you know why not?

MEM (Capt [M]): She never pressed any charges.

MJ: Was that based on your recommendation?

MEM (Capt [M]): No, sir.

MJ: Did you recommend to the contrary?

MEM (Capt [M]): I recommended that she discuss it with somebody who would be able --

MJ: Okay. Someone with more --

MEM (Capt [M]): Like a rape counselor.

MJ: Okay. Based on your relationship with your cousin and her experience, do you think that impacts your impartiality in any way to sit as a member in this case?

MEM (Capt [M]): I don't believe so, sir. I've also known women in college that I believed to be untruthful about alleging that they had been sexually assaulted.

MJ: Okay.

MEM (Capt [M]): So I've seen both sides, I believe.

MJ: All right. And so you're willing to wait and see what the evidence is in this case before reaching any judgments?

MEM (Capt [M]): Yes, sir.

MJ: And you'll hold the government to their burden?

MEM (Capt [M]): Yes, sir.

MJ: Okay. All right. Trial counsel, any questions?

TC: Yes, your honor. You mentioned that you knew some friends in college that you believed weren't truthful in alleging rape against someone?

MEM (Capt [M]): That was my belief having known the men that they were charging, yes, sir.

TC: So, obviously, you had a high opinion of the character of the men that were being charged or a low opinion of the girls that were doing the charging?

MEM (Capt [M]): It was probably a little bit of both, sir, yes.

TC: Did any of those cases go to trial?

MEM (Capt [M]): Not that I was aware of, at least not during the time that I was in college.

TC: How many friends?

MEM (Capt [M]): It was two, two instances. They were not friends. I mean, the ones in college that I say were gentlemen that I did not believe to actually have done what they had been accused, they weren't very close friends of mine. It was just the scenario. You know how people talk.

> And I knew them; they were in a couple classes. And from what I knew of them and from what I knew of the women involved, I thought that probably they hadn't done it.
>
> TC: And that opinion was probably reinforced when there were no charges brought against the men?
>
> MEM (Capt [M]): Yes, sir.
>
> TC: No further questions.
>
> MJ: Defense?
>
> DC: Captain, taking into consideration the incident with your cousin and also these incidents that you knew about in college, can you put those out of the your mind and listen to the facts that you're going to hear today and decide this case on the evidence that is put before you as a member?
>
> MEM (Capt [M]): Yes, sir.
>
> DC: Nothing further, your Honor.
>
> MJ: Anything else, government?
>
> TC: No, your Honor.
>
> Record at 338-40.

After individual voir dire, the defense challenged four members for cause, including Capt [M]. *Id.* at 359-65. The military judge granted three of the four challenges. *Id.* In ruling on the challenge against Capt [M], the military judge provided the following analysis:

> MJ: Okay. The challenge as to Capt [M] is denied. In my view or the court's view it wasn't limited to her testimony related to her cousin, but she brought up on her own the acquaintances she had from college and the other people that she thought had made false allegations, and I just got the impression from her answering those questions and her demeanor and the way she wrestled with the answers to each of the questions that she will really be a fair and impartial member in this case. So that case -- or excuse me -- that challenge for cause is denied as to Captain [M].
>
> *Id.* at 360.

Law/Standard of Review

A court member must be excused for cause when-ever it appears that the member should not sit as a member in the interest of having the court-martial "free from substantial doubt as to legality, fairness, and impartial-ity." RULE FOR COURTS-MARTIAL 912(f)(1)(N), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.).

R.C.M. 912 (f)(1)(N) encompasses challenges for actual bias as well as implied bias. *See United States v. Schlamer*, 52 M.J. 80, 92 (C.A.A.F. 1999)(citing *United States v. Napoleon*, 46 M.J. 279, 283 (C.A.A.F. 1997)). Accordingly, "military judges are required to test the impartiality of potential panel members on the basis of both actual and

implied bias." *United States v. Richardson*, 61 M.J. 113, 118 (C.A.A.F. 2005). "Challenges for actual or implied bias are evaluated based on a totality of the circumstances." *Id.* (citing *United States v. Strand*, 59 M.J. 455, 459 (C.A.A.F. 2004)).

The applicable standard of appellate review of a military judge's challenge for cause decision is "'clear abuse of discretion.'" *United States v. Quintanilla*, 63 M.J. 29, 35 (C.A.A.F. 2006)(quoting *United States v. James*, 61 M.J. 132, 138 (C.A.A.F. 2005)). As we conduct our review, we recognize that "'military judges must liberally grant challenges for cause.'" *James*, 61 M.J. at 139 (quoting *United States v. Downing*, 56 M.J. 419, 422 (C.A.A.F. 2002)).

Although they are not separate grounds for a challenge for cause, actual and implied bias are separate tests. *United States v. Miles*, 58 M.J. 192, 194 (C.A.A.F. 2003). "The test for actual bias is whether any bias 'is such that it will not yield to the evidence presented and the judge's instructions'". *United States v. Napoleon*, 46 M.J. 279, 283 (C.A.A.F. 1997)(quoting *United States v. Reynolds*, 23 M.J. 292, 294 (C.M.A. 1987)). Actual bias is a question of fact that tests a challenged member's credibility and demeanor when expressing his views. *See Richardson*, 61 M.J. at 118. We review the test for actual bias subjectively extending the military judge a "high degree of deference on rulings involving actual bias" since we recognize that the military judge was afforded the opportunity to observe the demeanor of the challenged member. *Id.*

We review issues of implied bias for an abuse of discretion, but the objective nature of the inquiry

affords less deference to the military judge. *United States v. Townsend*, 65 M.J. 460, 463 (C.A.A.F. 2008)(citing *United States v. Armstrong*, 54 M.J. 51, 54 (C.A.A.F. 2000) and *United States v. Napoleon*, 46 M.J. 279, 283 (C.A.A.F. 1997)). However, "[a] military judge who addresses implied bias by applying the liberal grant man-date on the record will receive more deference on review than one that does not." *United States v. Clay*, 64 M.J. 274, 277 (C.A.A.F. 2007).

Notwithstanding a member's disclaimer of bias, there is implied bias "'when most people in the same position would be prejudiced.'" *United States v. Napolitano*, 53 M.J. 162, 167 (C.A.A.F. 2000)(quoting *Schlamer*, 52 M.J. at 92)(footnote omitted). We view implied bias objectively "'through the eyes of the public, focusing on the appearance of fairness.'" *Clay*, 64 M.J. at 276 (quoting *United States v. Rome*, 47 M.J. 467, 469 (C.A.A.F. 1998)).

Analysis

We hold that the military judge did not abuse his discretion in denying the challenge of Capt [M]. Turning first to actual bias,[5] during voir dire, Capt [M] affirmatively responded that her close relationship with her cousin would not affect her ability to be impartial and she agreed to decide this case based on the evidence presented. The fact that a member has a family member, friend, or relative who is the victim of a crime is not a per se

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[5] We note the appellant only raised implied bias as an issue. However, due to our Article 66, UCMJ, mandate, we will evaluate actual bias as well.

disqualification. *United States v. Jefferson*, 44 M.J. 312, 321 (C.A.A.F. 1996)(citations omitted). The military judge's statements on the record clearly demonstrate that he made a credibility determination, specifically commenting on Capt [M]'s demeanor and forthright discussion about other situations in which Capt [M] believed allegations of sexual assault were false. Accordingly, we find no abuse of discretion as to actual bias.

Furthermore, we do not believe the appearance of the proceedings was rendered unfair by Capt [M]'s presence on the panel. Capt [M]'s voir dire responses indicate that, although she had a close relationship with her cousin, she did not proactively involve herself in her cousin's situation. She appeared to respect her cousin's decision regarding how to handle the situation and did not attempt to influence that decision. Capt [M] also volunteered information about having known women in college who had alleged they were sexually assaulted, but whom she believed to be untruthful. Capt [M] discussed that she felt that the allegations were false based upon the credibility of the women and the men involved.

While the military judge did not expressly cite to the liberal grant mandate when he announced his findings, the liberal grant mandate was referenced by trial defense counsel during litigation of this motion and we are confident the judge considered it. Record at 359-60. Even granting no deference whatsoever to the military judge's determination, we nonetheless find that the military judge did not

abuse his discretion when he denied the appellant's challenge for cause against Capt [M].

III. Denial of Witnesses

In his third assignment of error, the appellant alleges that he was deprived of his Fifth and Sixth Amendment rights to call relevant witnesses on his behalf. We disagree.

Facts

When a rehearing in the appellant's cases was directed, Captain J.D. Rosen, USMC, was initially detailed as the appellant's trial defense counsel. Record at 4. Capt Rosen served as the appellant's trial defense counsel during the Article 39(a), UCMJ, sessions held on 8 November 2006, 1 December 2006, 3 January 2007, 27 March 2007, and 16-17 April 2007. When the court-martial re-convened on 5 November 2007, Capt Rosen was no longer detailed to the appellant's court-martial due to his separation from active duty. *Id.* at 276. LT Brian Mizer, JAGC, USN, was serving as the appellant's new detailed trial defense counsel. *Id.* at 276-77. Although the record of trial does not contain any documentation delineating the specific date that LT Mizer was detailed as the trial defense counsel, it is clear that he was serving as the appellant's defense counsel no later than late August 2007. *See* AE XXXV.

Initial Witness Requests

On 8 November 2006, the military judge, Col Landrum, with the agreement of counsel, established

a trial schedule, which included a 29 November 2006 deadline for witness requests. *See* AE I; Record at 13-14. On 1 December 2006, Capt Rosen submitted an initial written request for 36 witnesses. AE XV at 7-9. On 26 February 2007, Capt Rosen submitted a request for 14 witnesses, all of whom were on the 1 December 2006 request. *Id.* at 5-6. On 12 March 2007, the Government filed a response to Capt Rosen's written request for the 14 witnesses, approving the production of four witnesses and denying the production of the remaining 10 requested witnesses. *Id.* at 10-11.

Capt Rosen filed an addendum to his original Motion for Appropriate Relief (Motion for Witness Production) on 14 March 2007, which specifically requested the production of five of the 10 witnesses denied by the Government. AE XV at 1-4; AE XXIII. The Government filed a response to the motion on 22 March 2007. AE XVI.

During an Article 39(a) session held on 27 March 2007, Col Landrum heard oral argument on the appellant's motion for the production of witnesses. Record at 142-62. On 5 April 2007, Col Landrum ordered the production of two of the requested defense witnesses. He denied two of the requests by determining that a stipulation of expected testimony was an adequate substitute and, as aforementioned, denied the request for LCpl Wanzer by noting that the defense had conceded that her testimony was cumulative with that of another witness. *Id.* at 161-62; AE XXXI at 3.

Subsequent Witness Request

After being detailed to the appellant's case, LT Mizer submitted new witness requests to the Government via e-mail and letters on 30 August and 7 September 2007. AE XXXV-XXXIX. He requested the production of 11 witnesses, most of whom were not previously re-quested by Capt Rosen. The 30 August 2007 list included a request for the production of Johna K. Cardenas, a former Marine Corps staff sergeant, and Joseph E. Krause, a former Marine Corps officer, both of whom testified as good military character witnesses at the appellant's original general court-martial. The 7 September 2007 list included a request for the production of Mr. Morgan, a former Marine Corps staff sergeant and law enforcement officer. *Id.*

During an Article 39(a), UCMJ, session held when the court-martial reconvened on 5 November 2007, LT Mizer apprised the military judge that the Government had just informed him, for the first time, that it had not produced numerous witnesses previously requested by the defense in late August and early September 2007. Record at 296. Regarding Mr. Cardenas and Mr. Krause, LT Mizer argued that he submitted the request for the production of these two witnesses in a timely manner, provided sufficient contact information to the Government in late August and early September, and informed the Government that they were military character witnesses. *Id.* at 297, 299-302. LT Mizer also informed the military judge that Mr. Cardenas and Mr. Krause testified at the appellant's initial court-martial. *Id.* at 300-01. The Government responded

that it requested additional contact information as well as an explanation why their testimony was relevant and necessary, and did not receive any response from the appellant. *Id.* at 299-301.

Regarding Mr. Morgan, LT Mizer informed the court that he was the first law enforcement official to arrive on the scene after the victim alleged she had been raped. *Id.* at 303-04. LT Mizer indicated he now possessed Mr. Morgan's 1 May 1999 investigative notes, which were not available when the appellant's speedy trial motion was previously litigated. *Id.* at 303, 470; DE H; AE XL. He stated that the defense had not spoken with Mr. Morgan and did not have had any contact in-formation for him, but wanted the Government to find and produce him. *Id.* at 303, 310. LT Mizer proffered that the investigative notes contained information inconsistent with the victim's testimony at the original trial. *Id.* The Government indicated that it had not made any at-tempt to locate Mr. Morgan because the appellant had not provided any contact information for him nor was the Government asked to locate him. *Id.* at 309.

At an Article 39(a), UCMJ, session held the next day, LT Mizer provided the military judge the e-mail and written requests for the production of witnesses he previously provided to the Government. *Id.* at 469-70; AE XXXV-XXXIX.

Military Judge's Ruling

The military judge determined that the production of witness requests made on 30 August and 7 September 2007 were untimely submitted because they exceeded the "court's previously

established milestone and dates required for witness requests." Record at 311. Although acknowledging that LT Mizer was not originally as-signed to represent the appellant, the military judge determined that the defense was accountable to the court ordered witness request deadlines and informed LT Mizer that he should have raised the witness request is-sue with the court earlier. *Id.*

The military judge noted that, notwithstanding the timeliness issue, he did not "want to see the accused prejudiced, but also the government has an interest in trying this case this week finally after numerous delays." Id. at 311; *see also* Record at 471. Accordingly, the military judge ordered the Government to produce Mr. Sandi, one of the military character evidence witnesses on the appellant's 30 August 2007 witness request. *See* AE XXXVI. He denied the witness requests for Mr. Cardenas and Mr. Krause, but noted that the appellant could present their testimony through use of their prior testimony in the initial court-martial. Record at 312.

Finally, the military judge determined that the appellant had not met his burden of providing relevant contact information for Mr. Morgan and further determined that the request was filed past the "trial deadline." *Id.* However, the military judge eventually allowed the appellant to present Mr. Morgan's investigative notes under MILITARY RULE OF EVIDENCE 102, MAN-UAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.). *Id.* at 550-51.

Legal Requirements

In accordance with Article 46, UCMJ, "[t]he trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe." The President has set forth the prescribed regulations for the production of witnesses and evidence in R.C.M. 703. Pursuant to R.C.M. 703(b)(1), "[e]ach party is entitled to the production of any witness whose testimony on a matter in issue on the merits or on an interlocutory question would be relevant and necessary."

"A military judge's ruling on a request for a witness is reviewed for abuse of discretion." *United States v. McElhaney*, 54 M.J. 120, 126 (C.A.A.F. 2000)(citations omitted). A military appellate court "will not set aside a judicial denial of a witness request 'unless (we have) a definite and firm conviction that the (trial court) commit-ted a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors.'" *Id.* (quoting *United States v. Houser*, 36 M.J. 392, 397 (C.M.A. 1993)).

In order to determine if a requested witness is necessary, the following factors must be weighed: "the issues involved in the case and the importance of the requested witness to those issues; whether the witness is desired on the merits or the sentencing portion of the case, whether the witness's testimony would be merely cumulative; and the availability of alternatives to the personal appearance of the witness, such as depositions, interrogatories, or previous testimony." *Id.* at 127 (citing *United States*

v. Tangpuz, 5 M.J. 426, 429 (C.M.A. 1978)). Additionally, it is appropriate for the trial judge to consider the timeliness of the witness request when evaluating whether it is necessary to produce the witness. R.C.M. 703(c)(2)(C).

Legal Analysis

At the outset, we note it is apparent from the record of trial that LT Mizer and the trial counsel did not discuss the status of the appellant's 30 August and 7 September 2007 witness requests until 5 November 2007, the first day of trial.[6]

Request for the Production of Mr. Cardenas and Mr. Krause

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[6] Both parties should have communicated on a regular basis over this two-month period of time in order to ensure the witness request issue was resolved prior to the commencement of trial. Timely resolution of this request would have enabled the appellant to submit a written Motion to Compel the Production of Witnesses to the military judge well in advance of the trial date, rather than submitting a verbal request on the eve of trial.

We further note that this trial included many unique characteristics, such as a change of venue, change in detailed trial defense counsel, and a lengthy delay due to the Government's Article 62, UCMJ, appeal and the appellant's request for extraordinary relief in the nature of a writ of mandamus. Accordingly, it would have been prudent for the military judge to conduct either an Article 39(a), UCMJ, session or R.C.M. 802 conference prior to 5 November 2007 in order to reestablish trial milestones and deadlines and ensure that any outstanding issues, including witness request were resolved.

As aforementioned, although the military judge denied the motions for production of these witnesses, he permitted the appellant to present their prior testimony. Thus, we are convinced that the military judge considered timeliness as only one of his factors in evaluating whether it was necessary to produce these two wit-nesses. In our evaluation of the relevant witness request factors, we conclude that military character evidence was an important part of the appellant's defense. We note that Mr. Sandi, one of the appellant's military character wit-nesses, personally appeared at the court-martial. We conclude that Mr. Cardenas' and Mr. Krause's military character evidence was cumulative with that provided by Mr. Sandi. We also conclude that use of their prior testimony was a suitable alternative. We conclude that the military judge did not abuse his discretion in denying the motion for the production of Mr. Cardenas and Mr. Krause.

Request for the Production of Mr. Morgan

In his 7 September 2007 request for the production of Mr. Morgan, the appellant was required to provide sufficient contact information and a synopsis of his expected testimony sufficient enough to show the relevancy and necessity of his testimony. R.C.M. 703(c)(2)(B)(i). In his request, the appellant simply noted that Mr. Morgan was a military policemen, who was the first member of the law enforcement team to speak with the victim both before and after she spoke with a chaplain. The request does not contain any contact information or synopsis of expected testimony.

During the Article 39(a), UCMJ, sessions held on 5 and 6 November 2007, LT Mizer indicated that he had never interviewed Mr. Morgan and that Mr. Morgan did not testify at the appellant's initial trial. He also indicated that he did not possess any contact information, but had made attempts to locate Mr. Morgan on the internet. Re-cord at 303, 470. In his argument to the military judge, LT Mizer argued that the investigative notes contained information given to him by the victim that was inconsistent with what she said later that same day to a chaplain and NCIS, and with her testimony at the original trial. *Id.* at 303, 310.

We conclude that the appellant did not adequately comply with the requirements set forth in R.C.M. 703. However, our analysis does not end here. Based on the military judge's ultimate decision to permit the appellant to present Mr. Morgan's investigative notes as evidence under MIL. R. EVID. 102, we are convinced that he con-sidered timeliness and adequacy of the request as only two factors in evaluating whether it is necessary to produce Mr. Morgan. Since neither party had an opportunity to interview Mr. Morgan, it is speculative to assert that his investigative notes either confirm or contradict the victim's version of the facts. The military judge properly admitted the evidence and allowed the parties to argue the weight of the evidence to the members. As a result, there was no prejudice to the appellant.

IV. Motion to Reopen Article 32

The appellant argues that the military judge erred in failing to reopen the Article 32, UCMJ, hearing prior to his rehearing. Specifically, the appellant argues that he was materially prejudiced by the cumulative changes in the availability of witnesses and evidence by the time of the rehearing, which required reopening the Article 32, UCMJ, hearing. Appellant's Brief at 37-39. We disagree.

Article 63, UCMJ, states that a rehearing is a continuation of the original proceeding. Therefore, charges need not be re-preferred or re-referred and, in the case of a general court-martial, there is no requirement to con-duct a new Article 32, UCMJ, investigation. *United States v. Beatty*, 25 M.J. 311, 314-15 (C.M.A. 1987).

An Article 32, UCMJ, investigation was conducted prior to the appellant's first trial. AE IV; Record at 71-80. The CAAF set aside the findings and sentence of the appellant's first trial and authorized a rehearing, but did not dismiss the charge. *Moreno*, 63 M.J. at 143-44; Record at 72-74. At his rehearing, the appellant faced the same charge subject to the Article 32 investigation. Therefore, the appellant's rehearing was a continuation of the original proceeding and did not require a new Article 32 hearing. This assignment of error is without merit.

V. Factual Sufficiency

The appellant's fifth assignment of error asserts that the evidence is factually insufficient to sustain his rape conviction. We disagree.

Principles of Law

This court must determine both the factual and legal sufficiency of the evidence presented at trial. *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987); *see* Art. 66, UCMJ. The test for factual sufficiency is whether, after weighing all of the evidence in the record of trial and making allowances for the lack of personal observation, this court is convinced of the appellant's guilt beyond a reasonable doubt. *Turner*, 25 M.J. at 325. The test for legal sufficiency is whether, considering the evidence in the light most favorable to the Government, any rational trier of fact could have found all the essential elements beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); *United States v. Reed*, 51 M.J. 559, 561-62 (N.M.Crim.Ct.App. 1999), aff'd, 54 M.J. 37 (C.A.A.F. 2000). The term "reasonable doubt" does not mean the evidence must be free of conflict. *United States v. Lips*, 22 M.J. 679, 684 (A.F.C.M.R. 1986). The fact-finder may "believe one part of a witness' testimony and disbelieve another." *United States v. Harris*, 8 M.J. 52, 59 (C.M.A. 1979). The Government must, however, prove every element beyond a reasonable doubt, *United States v. Harville*, 14 M.J. 270, 271 (C.M.A. 1982), and the proof must be such as to exclude every fair and rational hypothesis except that of guilt. *United States v. Gray*, 51 M.J. 1, 56 (C.A.A.F. 1999); *United States v. Meeks*, 41 M.J. 150, 155-57 (C.M.A. 1994).

The offense of rape in May 1999 consisted of two elements: (1) that the accused committed an act of sexual intercourse; and (2) that the act of sexual intercourse was done by force and without the consent of the victim. *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES (1998 ed.), Part IV, P 45b(1).

Discussion

The appellant asserts that the evidence is factually insufficient because the testimony of the alleged victim was inconsistent and lacked credibility. Specifically, the appellant contends the victim's allegation is highly im-probable in light of the lack of evidence that a date-rape drug was used.

Since the appellant admitted at trial that he had sexual intercourse with the victim, the first element is met. We next evaluate whether we are satisfied beyond a reasonable doubt that the sexual intercourse occurred by force and without the consent of the victim. Considering that this was a "he said, she said" case, credibility of the witnesses was very important. LCpl [E] testified that on 30 April she went to a movie on base where she remem-bered eating popcorn. She could not remember if she had eaten anything else and that she frequently skipped meals. At about 0030, she and her boyfriend entered the enlisted club where she danced and drank about four beers before leaving at about 0245 when the club closed. Walking back to the barracks with a group that included the appellant and LCpl [O], LCpl [O] invited her to have another beer and that the appellant offered that they could have the beer in his

room. After consuming the beer in the appellant's room, LCpl [E] testified that she lost consciousness. Although it is not clear from the record as to why LCpl [E] may have lost consciousness, she testified that she had taken cold medication that week. She further testified that when she regained consciousness the first time, the appellant was on top of her engaging in sexual intercourse without her consent.

The appellant testified that he and LCpl [E] were asleep on the floor of his room and she initiated sexual contact with him, which escalated into consensual sexual intercourse.

There is no requirement in the law that the evidence be free from all doubt. Taking both the appellant's and LCpl [E]'s testimony at face value, since we did not have the opportunity to observe their demeanor and the demeanor of the other witnesses to make a credibility judgment, LCpl [E]'s testimony that she was unconscious or not in control of her faculties at the time the appellant was having sex with her supports a finding that she lacked the capacity to consent and, therefore, satisfies us beyond a reasonable doubt that the act of sexual intercourse was by force and without consent.

After considering the evidence in the light most favorable to the Government, we are convinced that a reasonable factfinder could have found all the essential elements beyond a reasonable doubt. *Jackson*, 443 U.S. at 318-19; *Turner*, 25 M.J. at 325; *Reed*, 51 M.J. at 561-62; *see also* Art. 66(c), UCMJ. In addition, after weighing all of the evidence in the record of trial and having made allowances for not

having personally observed the wit-nesses, we are convinced beyond a reasonable doubt that the appellant raped LCpl [E].

VI. Sixth Amendment Right to Counsel

The appellant asserts that his Sixth Amendment right to counsel was violated when the military judge denied his motion to appoint his appellate defense counsel, LT Mizer, as individual military counsel (IMC) with whom the appellant asserts he had an ongoing attorney-client relationship. We disagree.

Background Facts

In April 2004, after the appellant's first trial, LT Mizer was detailed to the appellant's case as appellate defense counsel pursuant to Article 70, UCMJ. On appeal, the appellant's case was set aside and a rehearing was authorized. Moreno, 63 M.J. at 144. On 15 and 29 September 2006, the appellant requested the assignment of LT Mizer to his case as IMC.[7] AE II at 8-9; AE III at 7-8. At the time of the IMC request, LT Mizer was assigned to the Navy-Marine Corps Appellate Defense Division, Code 45, as an appellate defense counsel. *Id.* On 16 October 2006, the appellant's IMC request for LT Mizer was

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[7] We note the 15 September 2006 request, which was submitted by LT Mizer on behalf of the appellant, and the 29 September 2006 request, which was submitted by the appellant himself, appear to be identical.

denied by LT Mizer's commander. AE III at 9-12. On 22 November 2006, the appellant filed a Motion for Appropriate Relief in which he asked the trial court to prohibit the rehearing until LT Mizer was detailed to the case. AE II at 1-4. The military judge denied the motion and ruled that the IMC request had been properly denied. Record at 82-84.

Law

The ruling of a military judge on an IMC request, including whether such a ruling severed an attorney-client relationship, is a mixed question of fact and law. *United States v. Spriggs*, 52 M.J. 235, 244 (C.A.A.F. 2000). The military judge's legal conclusions are subject to de novo review and his findings of fact are reviewed under a clearly erroneous standard. *Id.* (citing *United States v. White*, 48 M.J. 251, 257 (C.M.A. 1998)).

Members of the armed forces are provided with counsel rights broader than those available to civilian counterparts under the Sixth Amendment. *Id.* at 237. A servicemember has the right to be represented by military counsel regardless of indigence and, under certain circumstances, has the right to select a particular military counsel. *Id.*

Article 38, UCMJ, permits an accused to be represented by individual military counsel of his own selection if that person is "reasonably available". A request for individual military counsel can be properly denied if the requested counsel is not "reasonably available" unless "the accused asserts that there is an existing attorney-client relationship regarding a charge in question or that the person

will not . . . be among those so listed as not reasonably available. R.C.M. 506(b)(2).

Appellate defense counsel are deemed to be not "reasonably available" for purposes of IMC requests. R.C.M. 506 (b)(1); Judge Advocate General Instruction 5800.7D, § 131(b)(4)(22 Mar 2004). However, the Sec-retary of the Navy is permitted to create exceptions to this prohibition based upon the existence of an attorney-client relationship between the appellant and requested counsel regarding matters related to a charge in question. R.C.M. 506(b)(1). Nonetheless, R.C.M. 506(b)(1) states that if the attorney-client relationship between the appellant and requested counsel arose solely as a result of the requested counsel's representation of the accused on appeal under Article 70, UCMJ, an exception shall not apply.

Analysis

In reviewing the military judge's decision for error, the appellant specifically asks us to reinterpret Article 70 in light of the Sixth Amendment's application to service-members and argues that his Sixth Amendment right to a counsel with whom he had an ongoing attorney-client relationship should trump the R.C.M. 506 limitations on the scope of an attorney-client relationship. We decline to reinterpret Article 70 and hold the military judge did not err when he denied the appellant's IMC request.

At the time of the appellant's IMC request, LT Mizer was assigned as an appellate defense counsel. Although the appellant alleges that LT Mizer should

have been allowed to represent him because an attorney-client relationship was formed between he and LT Mizer as a result of LT Mizer's representation of him on appeal, R.C.M. 506 (b)(1) expressly prohibits an exception to the rule regarding "reasonable availability" if the attorney-client relationship was formed as a result of the appellant's representation by the requested counsel on appeal. Therefore, regardless of whether an attorney-client rela-tionship was formed between LT Mizer and the appellant, LT Mizer was not "reasonably available" at the time of the IMC request to represent the accused at his rehearing.[8] 8 Accordingly, we agree with the military judge's denial of the motion.

VII. Panel of less than 6 members violated Due Process rights

The appellant contends that a five-member court-martial denies him Due Process as outlined in *Ballew v. Georgia*, 435 U.S. 223, 98 S. Ct. 1029, 55 L. Ed. 2d 234 (1978). We disagree.

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[8] When the court-martial reconvened on 5 No-vember 2007, LT Mizer had replaced Capt Rosen as the appellant's detailed defense counsel. From the record, it appears that LT Mizer had transferred out of the Appellate Defense Division and was assigned elsewhere when he appeared as counsel for the appellant. We are required to evaluate LT Mizer's status at the time the appellant's request was made. Therefore, LT Mizer's subsequent transfer out of the Appellate Defense Division and later assignment to the case as de-tailed defense counsel does not factor into our analysis.

There is no Sixth Amendment right to a jury trial in the military. *United States v. Dowty*, 60 M.J. 163, 169 (C.A.A.F. 2004)(citing *United States v. Kemp*, 22 C.M.A. 152, 46 C.M.R. 152, 154 (C.M.A. 1973)). The constitution of courts-martial is a matter determined by Congress. U.S. CONST. art.I, § 8, cl. 14. Congress affords service members the right to have a panel of members for a general court-martial pursuant to Article 16, UCMJ. Article 16, UCMJ, requires that general courts-martial consist of not less than five members.

The court-martial in this case consisted of five members. Therefore, the appellant was afforded his statutory right to a panel of not less than five members as required by Article 16, UCMJ.

VIII. Missing Document

On 9 April 2009, we ordered the Government to produce two missing pages from exhibits in the record. On 4 May 2009, the Government produced page 5 of Defense Exhibit H. However, the Government was un-able to locate page 23 of Defense Exhibit N, which contains a portion of the victim's prior testimony at LCpl [O]'s trial. Record at 691. We conclude that this omission from the record does "not raise a presumption of prejudice or affect the record's characterization as a complete one." *United States v. Henry*, 53 M.J. 108, 111 (C.A.A.F. 2000).

IX. Conclusion

Accordingly, the findings of guilty and the sentence, as approved by the convening authority, are affirmed.

Judge PRICE and Judge STOLASZ concur.

APPENDIX C

UNITED STATES, Appellee, v. Javier A. MORENO Jr., Corporal, U.S. Marine Corps, Appellant

No. 04-0698

UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

63 M.J. 129; 2006 CAAF LEXIS 632

September 21, 2005, Argued
May 11, 2006, Decided

COUNSEL: For Appellant: Lieutenant Brian L. Mizer, JAGC, USNR (argued).

For Appellee: Major Kevin C. Harris, USMC (argued); Lieutenant Colonel William Lietzau, USMC, Commander Charles N. Purnell, JAGC, USN, and Lieutenant Donald L. Palmer, JAGC, USNR (on brief).

JUDGES: ERDMANN, J., delivered the opinion of the court, in which GIERKE, C.J., and EFFRON and BAKER, JJ., joined. CRAWFORD, J., filed a separate opinion concurring in part and dissenting in part.

OPINION BY: ERDMANN

OPINION

Judge ERDMANN delivered the opinion of the court.

Corporal Javier A. Moreno Jr. was tried by general court-martial for the offense of rape in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920 (2000). Moreno entered a plea of not guilty but was convicted by members who subsequently sentenced him to a dishonorable discharge, confinement for six years, forfeiture of all pay and allowances, and reduction to the lowest enlisted grade. The convening authority approved the sentence and the United States Navy-Marine Corps Court of Criminal Appeals affirmed the findings and sentence in an unpublished decision. *United States v. Moreno*, No. NMCCA 200100715, 2004 CCA LEXIS 118 (N-M. Ct. Crim. App. May 13, 2004). We granted review of three issues.[1]

> We heard argument in this case on September 21, 2005, aboard the USS RONALD REAGAN (CVN 76) afloat in the Pacific Ocean as part of

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[1] On March 18, 2005, we granted review of the following issues:
I. WHETHER LIEUTENANT COLONEL [F] WAS AN INVESTIGATING OFFICER WITHIN THE MEANING OF R.C.M. 912(f)(1)(F) AND SHOULD NOT HAVE SERVED AS PRESIDENT OF APPELLANT'S COURT-MARTIAL.
II. WHETHER LIEUTENANT COLONEL [F]'S SERVICE AS PRESIDENT OF APPELLANT'S COURT-MARTIAL RAISED SUBSTANTIAL DOUBT TO THE LEGALITY, FAIRNESS, AND IMPARTIALITY OF APPELLANT'S COURT-MARTIAL.
III. WHETHER APPELLANT'S DUE PROCESS RIGHT TO TIMELY REVIEW OF HIS APPEAL HAS BEEN DENIED.

the Court's "Project Outreach." *See United States v. Mahoney*, 58 M.J. 346, 347 n.1 (C.A.A.F. 2003). This practice was developed as part of a public awareness program to demonstrate the operation of a Federal Court of Appeals and the military justice system.

An accused is entitled to a trial by members who are qualified, properly selected, and impartial. *See* Article 25, UCMJ, 10 U.S.C. § 825 (2000). Moreno claims that Lieutenant Colonel (LtCol) F, the president of his court-martial, should have been removed because he had conducted an investigation of the case, had extensive knowledge of this case and that of Moreno's co-accused, and was married to a rape counselor who had previously worked at the family advocacy office where the alleged victim was counseled. We conclude that the presence of LtCol F on the panel created substantial doubt about the fairness and impartiality of this court-martial and that the military judge erred in denying the challenge for cause against LtCol F.[2]

Due process entitles convicted service members to a timely review and appeal of court-martial convictions. *Toohey v. United States*, 60 M.J. 100,

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[2] Because of our holding that the military judge erred in denying the challenge for cause against LtCol F, we need not address the first granted issue concerning whether LtCol F acted as an investigating officer within the meaning of Rule for Courts-Martial (R.C.M.) 912(f)(1)(F), Manual for Courts-Martial, United States (2005 ed.) (MCM). Similarly, because we find that LtCol F possessed too much pretrial information about the case, we need not address the effect of his wife's role as a rape counselor.

101 (C.A.A.F. 2004). Moreno asserts that he was denied due process because there was unreasonable delay in the 1,688 days between the end of his trial and the date upon which the United States Navy-Marine Corps Court of Criminal Appeals rendered its decision in his case. We conclude that Moreno was denied his due process right to speedy appellate review and we find that under the circumstances of this case relief is warranted.

BACKGROUND

Moreno worked in the comptroller's disbursing office. Among the members detailed to Moreno's court-martial was LtCol F, the deputy comptroller. Lieutenant Colonel F was advised of the incident that gave rise to the rape charge by Moreno's officer-in-charge. Lieutenant Colonel F decided to look into the incident further so that he could brief the comptroller. In the course of his inquiry into the incident, LtCol F became aware of information that had been entered into various logbooks. He spoke to some of the duty officers who had knowledge of the incident and he read various articles that were published in Stars and Stripes. Lieutenant Colonel F described his efforts to gather this information as "simply fact finding. You know, I wanted to be able to get all the -- find out what was being reported in the logbook and just so I had a complete picture before I talked to my boss on what he would be hearing Monday morning."

In addition to his personal inquires into the incident, LtCol F became aware of Moreno's co-accused's case based on what he read in Stars and

Stripes. Lieutenant Colonel F's pretrial knowledge of the incident and the subsequent criminal cases included: (1) that the incident involved drinking at the club; (2) that the victim may have been drugged; (3) that there had been sexual contact; (4) that both Moreno and his co-accused were placed in pretrial confinement; (5) that the co-accused could be a witness at Moreno's trial; and (6) that there were delays in Moreno's trial relating to obtaining the co-accused's presence at Moreno's trial.

Defense counsel challenged eight members appointed by the convening authority on a variety of grounds. The defense asserted that LtCol F could not be impartial because he "followed this case closely" and had "read everything involving this case." The Government responded that the defense counsel had failed to state a reason for a challenge under Rule for Courts-Martial (R.C.M.) 912, Manual for Courts-Martial, United States (2005 ed.) (MCM).[3] [3] The military judge, while granting seven of the eight challenges for cause, denied the challenge, against LtCol F without comment. The defense counsel then exercised a peremptory challenge against another member. Ultimately, LtCol F served as president of the court-martial.

Moreno was sentenced on September 29, 1999. Two hundred eight days later, the 746-page record of trial was authenticated by the military judge. On January 31, 2001, 490 days after completion of the

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[3] R.C.M. 912(f)(1)(N) in the 2005 edition of the MCM is identical to that in the 1998 edition of the MCM that was in effect at the time of Moreno's trial.

trial, the convening authority took action. Seventy-six days later, the case was docketed at the Navy-Marine Corps Court of Criminal Appeals.

The Navy-Marine Corps Court of Criminal Appeals granted eighteen motions for enlargement of time to Moreno's appellate defense attorney before the defense brief was filed on March 20, 2003 (702 days from docketing). The Government filed an answer brief on October 29, 2003 (223 days from submission of Moreno's brief). The Court of Criminal Appeals issued its unpublished decision on May 13, 2004 (197 days from the completion of briefing). Four years, seven months and fourteen days (1,688 days) elapsed between the completion of trial and the completion of Moreno's appeal of right under Article 66, UCMJ, 10 U.S.C. § 866 (2000).

DISCUSSION

Implied Bias

Moreno asserts that LtCol F's presence on his court-martial panel undermined public confidence in military justice and that, under the liberal grant mandate, the military judge should have granted the challenge for cause. The Government argues that some knowledge of the facts does not serve to disqualify a potential court member and that the totality of the circumstances reveals that Moreno did not meet his burden of showing a substantial doubt as to the legality, fairness or impartiality of the trial.

Rule for Courts-Martial 912 includes challenges based upon the distinct concepts of actual bias and implied bias. *United States v. Napoleon*, 46 M.J. 279,

283 (C.A.A.F. 1997); *United States v. Minyard*, 46 M.J. 229, 231 (C.A.A.F. 1997). In this case we are concerned with the possibility of implied bias under R.C.M. 912(f)(1)(N), which provides a basis for challenge when it appears an individual "should not sit as a member in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality."

The test for implied bias is objective. Viewing the circumstances through the eyes of the public and focusing on the perception or appearance of fairness in the military justice system, we ask whether, despite a disclaimer of bias, most people in the same position as the court member would be prejudiced. *United States v. Napolitano*, 53 M.J. 162, 167 (C.A.A.F. 2000); *United States v. Warden*, 51 M.J. 78, 81 (C.A.A.F. 1999). We look to determine whether there is "too high a risk that the public will perceive" that the accused received less than a court composed of fair, impartial, equal members. *United States v. Wiesen*, 56 M.J. 172, 176 (C.A.A.F. 2001). We review rulings on challenges for implied bias under a standard that is less deferential than abuse of discretion, but more deferential than de novo review. *United States v. Armstrong*, 54 M.J. 51, 54 (C.A.A.F. 2000); *Napoleon*, 46 M.J. at 283.

In reviewing a ruling on a challenge for cause, we remain mindful of the liberal grant mandate. "Military judges must follow the liberal-grant mandate in ruling on challenges for cause" asserted by an accused. *United States v. White*, 36 M.J. 284, 287 (C.M.A. 1993); *see also United States v. James*, 61 M.J. 132, 139 (C.A.A.F. 2005); *United States v.*

Downing, 56 M.J. 419, 422 (C.A.A.F. 2002). The liberal grant mandate recognizes the unique nature of military courts-martial panels, particularly that those bodies are detailed by convening authorities and that the accused has only one peremptory challenge. *See James*, 61 M.J. at 139; *Downing*, 56 M.J. at 422; *United States v. Rome*, 47 M.J. 467, 469 (C.A.A.F. 1998); *United States v. Hamilton*, 41 M.J. 22, 25 (C.M.A. 1994). Thus, we will overturn a military judge's ruling on an accused's challenge for cause where he clearly abuses his discretion in applying the liberal grant mandate.

Implied bias should be invoked sparingly. *United States v. Strand*, 59 M.J. 455, 458 (C.A.A.F. 2004) (citing *Warden*, 51 M.J. at 81-82); *Rome*, 47 M.J. at 469. Nevertheless, we are not reluctant to apply the doctrine to ensure the appearance of fairness in courts-martial. Thus, in *Minyard*, 46 M.J. at 231-32, we reversed a conviction where the wife of an investigating agent who worked on the case was allowed to sit on the panel. In *Wiesen*, 56 M.J. at 175-77, we reversed a conviction where the president of the court-martial and his military subordinates comprised two-thirds of the panel. Similarly, in *United States v. Miles*, 58 M.J. 192, 195 (C.A.A.F. 2003), we reversed a conviction for use of cocaine where the military judge denied a challenge to a member whose nephew died from complications associated with his mother's prenatal use of cocaine.[4]

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[4] *See also United States v. Daulton*, 45 M.J. 212, 216-18 (C.A.A.F. 1996); *United States v. Smart*, 21 M.J. 15, 18-21 (C.M.A. 1985).

From the outset, LtCol F took an active interest in this case. He took it upon himself to seek out information so that he could get a "complete picture" to brief his boss, the comptroller. His preparations for the briefing included conducting personal interviews of duty officers and reading entries in various log books. Once he had gathered the information to brief the comptroller, his interest in Moreno's case did not wane. He read about the charges against Moreno in newspapers and also read about the court-martial of Moreno's co-accused, who was acquitted of wrongdoing for the same incident.[5]

We believe that an objective observer would perceive that LtCol F possessed an excessive level of pretrial knowledge about the incident to sit as an impartial panel member. His personal inquiry went beyond a routine passing of information to a superior. His inquires were so thorough that he subjectively believed he knew all there was to know -- that he had the "complete picture."

Under these circumstances -- where LtCol F had investigated the incident, weighed facts, made recommendations based on his conclusions and continued to follow both this case and the case of Moreno's co-accused in the press -- an objective observer could reasonably question whether LtCol F could come to any different conclusions based solely on evidence presented in court. An observer could

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[5] Moreno's co-actor was acquitted of rape on August 19, 1999. The following day, an article appeared in Stars and Stripes captioned "Okinawa Marine innocent of rape." On August 27, 1999, Stars and Stripes reported that Moreno's trial would proceed despite the co-actor's acquittal.

also reasonably question whether LtCol F would contradict his initial conclusions and recommendations to the comptroller if warranted by the evidence.

An objective observer could harbor a reasonable concern that as president of the court-martial, LtCol F would exert influence over other court-martial members arising from his in-depth personal knowledge of the facts rather than from the evidence presented in court. We also believe that the objective observer would not accord much weight to LtCol F's assertion that he could be impartial in view of the depth of his prior involvement. "We do not accept as conclusive a challenged member's perfunctory disclaimer of personal interest or his assertion of impartiality." *United States v. Smart*, 21 M.J. 15, 19 (C.M.A. 1985).

Thus, we hold that there is a substantial doubt that this trial was by a panel of members who were fair and impartial and the military judge therefore erred by denying the challenge for cause against LtCol F.

Speedy Post-Trial and Appellate Review

Moreno contends that the 1,688 days that elapsed between the completion of his court-martial and the decision of the Court of Criminal Appeals was unreasonable and denied him due process. Moreno argues that he had legitimate claims of error in his case and that the delay has denied him the opportunity for meaningful relief. The Government counters that the time involved in Moreno's post-

trial processing and appeal was not unreasonable. Alternatively, the Government asserts that even if the delay is unreasonable, Moreno's due process rights have not been violated. The Supreme Court has recognized "the procedures used in deciding appeals must comport with the demands of the Due Process and Equal Protection Clauses of the Constitution." *Evitts v. Lucey*, 469 U.S. 387, 393, 105 S. Ct. 830, 83 L. Ed. 2d 821 (1985); *see also Diaz v. Judge Advocate General of the Navy*, 59 M.J. 34, 38 (C.A.A.F. 2003). "An appeal that is inordinately delayed is as much a 'meaningless ritual,' *Douglas [v. California*, 372 U.S. 353, 358, 83 S. Ct. 814, 9 L. Ed. 2d 811 (1963)], as an appeal that is adjudicated without the benefit of effective counsel or a transcript of the trial court proceedings." *Harris v. Champion (Harris II)*, 15 F.3d 1538, 1558 (10th Cir. 1994).

This court has recognized that convicted servicemembers have a due process right to timely review and appeal of courts-martial convictions. *Toohey*, 60 M.J. at 101; *Diaz*, 59 M.J. at 37-38. We review de novo claims that an appellant has been denied the due process right to a speedy post-trial review and appeal. *See United States v. Rodriguez*, 60 M.J. 239, 246 (C.A.A.F. 2004) (conclusions of law are reviewed under the de novo standard); *United States v. Cooper*, 58 M.J. 54, 58 (C.A.A.F. 2003) (speedy trial issues, as conclusions of law, are reviewed de novo).

In conducting this review we have adopted the four factors set forth in *Barker v. Wingo*, 407 U.S. 514, 530, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972): (1)

the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right to timely review and appeal; and (4) prejudice. *United States v. Jones*, 61 M.J. 80, 83 (C.A.A.F. 2005); *Toohey*, 60 M.J. at 102. While *Barker* addressed speedy trial issues in a pretrial, Sixth Amendment context, its four-factor analysis has been broadly adopted for reviewing post-trial delay due process claims.[6]

Once this due process analysis is triggered by a facially unreasonable delay, the four factors are balanced, with no single factor being required to find that post-trial delay constitutes a due process violation. *Barker*, 407 U.S. at 533 ("We regard none of the four factors identified above as either a necessary or sufficient condition to the finding of a deprivation of [due process]."); *Simmons v. Reynolds*, 898 F.2d 865, 868 (2d Cir. 1990) ("No one factor is

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[6] *Latimore v. Spencer*, 994 F. Supp. 60, 67 (D. Mass. 1998) ("The First Circuit examines such cases on a case by case basis applying factors similar to those employed in *Barker*."); *Simmons v. Reynolds*, 898 F.2d 865, 868 (2d Cir. 1990); *Burkett v. Cunningham*, 826 F.2d 1208, 1222 (3d Cir. 1987); *United States v. Johnson*, 732 F.2d 379, 381-82 (4th Cir.), *cert. denied*, 469 U.S. 1033, 105 S. Ct. 505, 83 L. Ed. 2d 396 (1984); *Rheuark v. Shaw*, 628 F.2d 297, 303 (5th Cir. 1980), *cert. denied*, 450 U.S. 931, 101 S. Ct. 1392, 67 L. Ed. 2d 365 (1981); *United States v. Smith*, 94 F.3d 204, 207 (6th Cir. 1996); *United States v. Kimmons*, 917 F.2d 1011, 1015 (7th Cir. 1990); *United States v. Hawkins*, 78 F.3d 348, 350-51 (8th Cir.), *cert. denied*, 519 U.S. 844, 117 S. Ct. 126, 136 L. Ed. 2d 76 (1996); *United States v. Tucker*, 8 F.3d 673, 676 (9th Cir. 1993)(*en banc*), *cert. denied*, 510 U.S. 1182, 114 S. Ct. 1230, 127 L. Ed. 2d 574 (1994); *Harris v. Champion (Harris I)*, 938 F.2d 1062, 1068 (10th Cir. 1991); *Harris v. Champion (Harris II)*, 15 F.3d 1538, 1559 (10th Cir. 1994); *Harris v. Champion (Harris III)*, 48 F.3d 1127 (10th Cir. 1995).

dispositive and all are to be considered together with the relevant circumstances.").

We analyze each factor and make a determination as to whether that factor favors the Government or the appellant. *See Rheuark v. Shaw*, 628 F.2d 297, 303 (5th Cir. 1980) (calling for an ad hoc evaluation of the four *Barker* factors). We then balance our analysis of the factors to determine whether there has been a due process violation. *Barker*, 407 U.S. at 533 ("Courts must still engage in a difficult and sensitive balancing process."). No single factor is required for finding a due process violation and the absence of a given factor will not prevent such a finding. *Id.* With this structure as our guide, we turn to an analysis of the four factors as they arise in Moreno's case.

1. Length of the delay

Initially, unless the delay is facially unreasonable, the full due process analysis will not be triggered. *Toohey*, 60 M.J. at 102. We conduct a case-by-case analysis to determine if a given delay is facially unreasonable.[7] *Id.* at 103.[8] In this case we

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[7] *Rheuark*, 628 F.2d at 303 ("Not every delay in the appeal of a case, even an inordinate one, violates due process.").

[8] In the speedy trial context, "extreme cases of delay would produce a strong presumption of prejudice to the ability of a party to defend itself at trial . . . ." *United States v. Smith*, 94 F.3d 204, 211 (6th Cir. 1996) (citing *Doggett v. United States*, 505 U.S. 647, 655-58, 112 S. Ct. 2686, 120 L. Ed. 2d 520 (1992)). Circuit courts have split on whether the *Doggett* presumption of prejudice is applicable to a due process appellate delay analysis. Compare *Harris II*, 15 F.3d at 1564, and *Smith*, 94 F.3d at 211-12 (presumption applicable), with *United States v. Mohawk*, 20 F.3d 1480, 1487-88 (9th Cir. 1994) (presumption not

conclude that the overall period of post-trial review and appeal, 1,688 days, is facially unreasonable and thus we will proceed to the remaining *Barker* factors.

2. Reasons for the delay

Under this factor we look at the Government's responsibility for any delay, as well as any legitimate reasons for the delay, including those attributable to an appellant. In assessing the reasons for any particular delay, we examine each stage of the post-trial period because the reasons for the delay may be different at each stage and different parties are responsible for the timely completion of each segment.[9]

The 490 days between the end of trial and the convening authority's action is excessive for the post-trial processing of this case. The processing in this segment is completely within the control of the Government and no exceptional circumstances have been offered to explain this delay. *See United States v. Bigelow*, 57 M.J. 64, 68-69 (C.A.A.F. 2002). It is striking that this period is over five times longer than that deemed reasonable by this court when we established the ninety-day rule in *Dunlap v. Convening Authority*, 23 C.M.A. 135, 48 C.M.R. 751 (1974).[10] The seventy-six days between action and

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applicable).

[9] Convening authorities, reviewing authorities, and the Courts of Criminal Appeals can provide significant relief for unreasonable delays at their respective stages of the process.

[10] In *Dunlap v. Convening Authority*, 23 C.M.A. 135, 138, 48 C.M.R. 751, 754 (1974), this court presumed a denial of speedy disposition where the convening authority failed to take action within ninety days of trial. The presumption placed "a heavy

docketing the case before the Court of Criminal Appeals is also unexplained. Delays involving this essentially clerical task have been categorized as "the least defensible of all" post-trial delays. *United States v. Dunbar*, 31 M.J. 70, 73 (C.M.A. 1990).

The longest delay in this case -- 925 days -- involves the period from which the case was docketed at the Court of Criminal Appeals until briefing was complete. The Government claims that Moreno is directly responsible for the almost two years it took to file his brief at the Court of Criminal Appeals. The record reflects that appellate defense counsel sought and was granted eighteen enlargements of time within which to file a brief. Enlargement numbers four through eighteen each contained the same reason for the request: "other case load commitments."

While the Government argued that this period of delay was in Moreno's interest, there was no evidence demonstrating that the enlargements were directly attributable to Moreno or that the need for additional time arose from other factors such as the complexity of Moreno's case. The Government further argued that we should presume the delays were for Moreno's benefit, but did not provide any legal authority to support such a presumption. There is no evidence in this case that the numerous requests for delay filed by appellate defense counsel benefited Moreno or that Moreno was consulted

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burden on the Government to show diligence, and in the absence of such a showing the charges should be dismissed." *Id.* (internal quotation marks omitted).

about and agreed to these delays. "Other case load commitments" logically reflects that Moreno's case was not getting counsel's professional attention, a fact that is the very antithesis of any benefit to Moreno. We therefore decline to hold Moreno accountable for this period of delay. As we said in *Diaz*, 59 M.J. at 38:

> Appellate counsel caseloads are a result of management and administrative priorities and as such are subject to the administrative control of the Government. To allow caseloads to become a factor in determining whether appellate delay is excessive would allow administrative factors to trump the Article 66 and due process rights of appellants. To the contrary, the Government has a statutory responsibility to establish a system of appellate review under Article 66 that preserves rather than diminishes the rights of convicted servicemembers. In connection with that responsibility, the Government has a statutory duty under Article 70 to provide Petitioner with appellate defense counsel who is able to represent him in both a competent and timely manner before the Court of Criminal Appeals.

Internal footnote omitted. *See also Barker*, 407 U.S. at 531 (noting that ultimate responsibility of delay

caused by negligence or overcrowded courts rests with the Government).[11]

While appellate defense counsel's caseload is the underlying cause of much of this period of delay, responsibility for this portion of the delay and the burden placed upon appellate defense counsel initially rests with the Government. The Government must provide adequate staffing within the Appellate Defense Division to fulfill its responsibility under the UCMJ to provide competent and timely representation. *See* Article 70, UCMJ, 10 U.S.C. § 870 (2000). Ultimately the timely management and disposition of cases docketed at the Courts of Criminal Appeals is a responsibility of the Courts of Criminal Appeals. Therefore, we decline to hold Moreno responsible for the lack of "institutional vigilance" which should have been exercised in this case. *See Diaz*, 59 M.J. at 39-40.

The final period of delay is the 197 days from submission of the final briefs to the Court of Criminal Appeal's decision. We will apply a more flexible review of this period, recognizing that it involves the exercise of the Court of Criminal Appeal's judicial decision-making authority.[12] [12] We

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[11] See *Harris II*, 15 F.3d at 1562-63 ("lack of funding and, possibly, the mismanagement of resources by the Public Defender" were not an "acceptable excuse for delay."); *Coe v. Thurman*, 922 F.2d 528, 531 (9th Cir. 1990) (failures of court-appointed counsel and delays by the court are attributable to the state); *Simmons v. Beyer*, 44 F.3d 1160, 1170 (3d Cir. 1995).

[12] "Courts, of course, are not excluded from the obligation to give defendants a speedy trial. But the function of appellate courts necessarily casts the delay attendant upon their deliberations in a somewhat different light . . . ." *United States v. Bishton*,

find that a period of slightly over six months is not an unreasonable time for review by the Court of Criminal Appeals. Thus, under *Barker's* second factor -- reasons for the delay -- the unreasonable delays in this case are either unexplained or the responsibility of the Government. There is no reason given for the unreasonable delays in getting this case from trial to the convening authority for action and in docketing the case before the Court of Criminal Appeals after action. The Government bears responsibility for unreasonable delay during appeal occasioned by the workload of appellate defense counsel. We conclude that this second *Barker* factor weighs heavily in favor of Moreno.

3. Assertion of the right to a timely review and appeal

This factor calls upon us to examine an aspect of Moreno's role in this delay. Moreno did not object to any delay or assert his right to timely review and appeal prior to his arrival at this court. The Supreme Court in *Barker*, 407 U.S. at 531-32, noted that where the defendant has asserted his speedy trial right, it is "entitled to strong evidentiary weight in determining whether the defendant is being deprived

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150 U.S. App. D.C. 51, 463 F.2d 887, 890 (D.C. Cir. 1972). We are mindful in the military justice system of the distinct functions of a first level appeal of right court as opposed to a discretionary second level appellate court. The Courts of Criminal Appeals have "unique authority that is the product of the evolution of military justice in the United States." *United States v. Boone*, 49 M.J. 187, 191 (C.A.A.F. 1998). Congress provided these appellate tribunals with "an authority rarely if ever seen in other appellate courts." *Id.* at 192.

of the right." The Court rejected, however, "the rule that a defendant who fails to demand a speedy trial forever waives his rights." *Id.* at 528.

We do not believe this factor weighs heavily against Moreno under the circumstances of this case. The obligation to ensure a timely review and action by the convening authority rests upon the Government and Moreno is not required to complain in order to receive timely convening authority action. *United States v. Bodkins*, 60 M.J. 322, 323-24 (C.A.A.F. 2004). Similarly, Moreno bears no responsibility for transmitting the record of trial to the Court of Criminal Appeals after action. Nor is it unreasonable to assume, as Moreno argues, that a convicted person wants anything other than a prompt resolution of his appeal. *See Harris II*, 15 F.3d at 1563.

We also recognize the paradox of requiring Moreno to complain about appellate delay either to his appellate counsel who sought multiple enlargements of time because of other case commitments or to the appellate court that granted the enlargements on a routine basis.[13] While this factor weighs against Moreno, the weight against him is slight given that the primary responsibility for speedy processing rests with the Government and

[13] *See Harris II*, 15 F.3d at 1563 ("Furthermore, petitioners were hampered by the fact that they had to speak through their counsel in the state court appellate process and, in most instances, it was that very counsel who was responsible for the delay. Under these circumstances, we cannot fairly expect petitioners to have raised the issue of delay in state court.").

those to whom he could complain were the ones responsible for the delay.

4. Prejudice

In *Barker*, 407 U.S. at 532, the Supreme Court recognized a framework to analyze the "prejudice" factor in a speedy trial context. We agree with the Fifth Circuit's modification of that framework for analyzing prejudice in a due process post-trial delay analysis:

> In the case of appellate delay, prejudice should be assessed in light of the interests of those convicted of crimes to an appeal of their convictions unencumbered by excessive delay. We identify three similar interests for prompt appeals: (1) prevention of oppressive incarceration pending appeal; (2) minimization of anxiety and concern of those convicted awaiting the outcome of their appeals; and (3) limitation of the possibility that a convicted person's grounds for appeal, and his or her defenses in case of reversal and retrial, might be impaired.

Rheuark, 628 F.2d at 303 n.8; *see also United States v. Hawkins*, 78 F.3d 348, 351 (8th Cir. 1996); *Coe v. Thurman*, 922 F.2d 528, 532 (9th Cir. 1990); *Harris* II, 15 F.3d at 1547.

a. Oppressive Incarceration Pending Appeal

This sub-factor is directly related to the success or failure of an appellant's substantive appeal. If the

substantive grounds for the appeal are not meritorious, an appellant is in no worse position due to the delay, even though it may have been excessive. *Cody v. Henderson*, 936 F.2d 715, 720 (2d Cir. 1991). Under these circumstances, an appellant would have served the same period of incarceration regardless of the delay. *United States v. Antoine*, 906 F.2d 1379, 1382 (9th Cir. 1990). However, if an appellant's substantive appeal is meritorious and the appellant has been incarcerated during the appeal period, the incarceration may have been oppressive. *Coe*, 922 F.2d at 532.

Moreno served his full term of confinement before his appeal of right was resolved by the Court of Criminal Appeals. Before this court he has prevailed on a substantive appellate issue, his conviction will be set aside and he is entitled to a retrial. As the Fifth Circuit has noted:

> Moreover, if an appeal is not frivolous, a person convicted of a crime may be receiving punishment the effects of which can never be completely reversed or living under the opprobrium of guilt when he or she has not been properly proven guilty and may indeed be innocent under the law.

Rheuark, 628 F.2d at 304.[14]

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[14] "A system of appeal as of right is established precisely to assure that only those who are validly convicted have their freedom drastically curtailed." *Evitts v. Lucey*, 469 U.S. 387, 399-400, 105 S. Ct. 830, 83 L. Ed. 2d 821 (1985).

Moreno was sentenced to six years of incarceration. Although the record does not provide us with a precise release date, we can be reasonably certain that Moreno was released from confinement prior to the Court of Criminal Appeals' decision. Based on the 150 days of pretrial confinement credit and the duration of the adjudged confinement, we estimate that Moreno's minimum release date was about April, 2003. Thus, he had served at least four years in confinement, under a conviction that has now been set aside, prior to his appeal of right being decided. We therefore find that he has suffered some degree of prejudice as the result of oppressive incarceration.[15]

b. Anxiety and Concern

This sub-factor involves constitutionally cognizable anxiety that arises from excessive delay. Federal courts have adopted different approaches to this "prejudice" sub-factor. The Second Circuit has affirmed district court decisions which found anxiety-based prejudice that arose solely from the length of the delay. *Yourdon v. Kelly*, 969 F.2d 1042 (2d Cir. 1992)(table decision), *aff'g* 769 F. Supp. 112, 115 (W.D.N.Y. 1991); *Snyder v. Kelly*, 972 F.2d 1328 (2d

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[15] We note that this factor (oppressive incarceration) would weigh heavily against the Government if the incarceration relates to a finding that a Court of Criminal Appeals reverses for factual insufficiency. See *Diaz v. Judge Advocate General of the Navy*, 59 M.J. 34, 39 (C.A.A.F. 2003) ("Unlike the civilian criminal justice system, the Courts of Criminal Appeals have unique fact finding authority, and that aspect of a service member's case is not concluded until that review is completed.").

Cir. 1992)(table decision), *aff'g* 769 F. Supp. 108, 111 (W.D.N.Y. 1991).[16] [16]

The Ninth Circuit requires a showing of "particular anxiety", which must be distinguished from the normal anxiety experienced by any prisoner awaiting an appellate decision. *Antoine*, 906 F.2d at 1383; *see also Coe*, 922 F.2d at 532. The Third Circuit requires an appellant "to detail anxiety related to the processing of his case post-conviction." *Burkett v. Fulcomer*, 951 F.2d 1431, 1447 (3d Cir. 1991). The Tenth Circuit requires a "particularized and substantial showing of anxiety and concern, absent a delay so excessive as to trigger the *Doggett* presumption of prejudice." *Harris II*, 15 F.3d at 1565.

While some circuits require that an appellant have a meritorious appeal to prevail on this sub-factor, *see id.*, others have recognized anxiety arising from excessive delays regardless of whether the appellant prevails on a substantive issue.[17] We

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[16] Those district courts and the Second Circuit have found that the more appropriate remedy for anxiety-based prejudice arising from excessive appellate delay is an action for damages under 42 U.S.C. § 1983 (2000). *Cody v. Henderson*, 936 F.2d 715, 720 (2d Cir. 2000). We recognize that military service members are unable to pursue relief under 42 U.S.C. § 1983 as a result of the extended *Feres v. United States*, 340 U.S. 135, 71 S. Ct. 153, 95 L. Ed. 152 (1950), doctrine. *Chappell v. Wallace*, 462 U.S. 296, 304, 103 S. Ct. 2362, 76 L. Ed. 2d 586 (1983).

[17] *Snyder v. Kelly*, 769 F. Supp. 108, 111 (W.D.N.Y. 1991) (where conviction affirmed, court noted, "While he has not presented any evidence of prejudice to the appeal itself, it would not strike this Court as unusual that a five-year delay would profoundly worry an individual hopefully awaiting an ultimate appellate reversal").

believe that the appropriate test for the military justice system is to require an appellant to show particularized anxiety or concern that is distinguishable from the normal anxiety experienced by prisoners awaiting an appellate decision. This particularized anxiety or concern is thus related to the timeliness of the appeal, requires an appellant to demonstrate a nexus to the processing of his appellate review, and ultimately assists this court to "fashion relief in such a way as to compensate [an appellant] for the particular harm." *Burkett*, 951 F.2d at 1447. We do not believe that the anxiety that an appellant may experience is dependent upon whether his substantive appeal is ultimately successful. An appellant may suffer constitutionally cognizable anxiety regardless of the outcome of his appeal.

Moreno argues that he suffered prejudice because he was required to register as a sex offender upon his release from incarceration without the opportunity of having his appeal of right heard and decided. *See* 42 U.S.C. § 14071(a)(1)(A), (b)(6)(A) (2000). Moreno essentially argues that had his appeal been processed in a timely manner, it would have been resolved before his release from incarceration. Had Moreno's conviction been affirmed prior to his release, registration as a sex offender would have been a proper consequence of his conviction. However, Moreno argues that he has been "living under the opprobrium of guilt when he . . . has not been properly proven guilty and may indeed be innocent under the law." *Rheuark*, 628 F.2d at 304. The excessive delay in this case and our disposition

of the implied bias issue lend credence to Moreno's claim that he was prejudiced by the requirement to register as a sex offender. We find that this circumstance constitutes constitutional anxiety that is distinguishable from the normal anxiety experienced by prisoners awaiting appeal and that as a result Moreno has suffered some degree of prejudice.

c. Impairment of Ability to Present a Defense at a Rehearing

This final sub-factor is directly related to whether an appellant has been successful on a substantive issue of the appeal and whether a rehearing has been authorized. If an appellant does not have a meritorious appeal, there obviously will be no prejudice arising from a rehearing. If, however, a conviction has been set aside and a rehearing authorized, the appellate delay encountered by the appellant may have a negative impact on his ability to prepare and present his defense at the rehearing. Due to the passage of time, witnesses may be unavailable, memories may have faded and records of trial may have been misplaced or lost.

In order to prevail on this factor an appellant must be able to specifically identify how he would be prejudiced at rehearing due to the delay.[18] Mere

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[18] A requirement that an appellant demonstrate prejudice is not a unique requirement. See *United States v. Chatman*, 46 M.J. 321, 323-24 (C.A.A.F. 1997) (the court required an appellant "demonstrate prejudice [from new matter in a staff judge advocate's addendum] by stating what, if anything, would have been submitted to 'deny, counter, or explain' the new matter."); *United States v. Moulton*, 47 M.J. 227, 229 (C.A.A.F. 1997) (a

speculation is not enough. United States v. Mohawk, 20 F.3d 1480, 1487 (9th Cir. 1994). Moreno claims that prejudice exists under this factor because of the potential harm he would suffer in the event he is successful on appeal and a rehearing is authorized. He does not, however, identify any specific harm that he would encounter at a rehearing and he has therefore failed to establish prejudice under this sub-factor.[19]

Conclusion -- *Barker* Factors

Because of the unreasonably lengthy delay, the lack of any constitutionally justifiable reasons for the delay, and the prejudice suffered by Moreno as a result of oppressive incarceration and anxiety, our balancing of the four *Barker* factors leads us to conclude that Moreno was denied his due process right to speedy review and appeal. Because we have found legal error and substantial prejudice to a

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defendant who claims ineffective assistance of counsel must show that a counsel's deficient performance was "'so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.'" (quoting *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984))).

[19] We are mindful of the difficulty that an appellant and his appellate defense counsel may have at this juncture of the process in identifying problems that would hinder an appellant's ability to present a defense at rehearing. If an appellant does experience problems in preparing for trial due to the delay, a Sixth Amendment speedy trial motion could appropriately be brought at the trial level. "We are inclined to believe that a consideration of the Sixth Amendment speedy trial right in its most pristine sense would be triggered by any retrial of such a person. The consideration would, of course, be an ad hoc determination based on the four factors of *Barker*." *Rheuark*, 628 F.2d at 303 n.8.

material right, as well as a deprivation of due process, we need to consider appropriate relief. *See Jones*, 61 M.J. at 86.

Before we turn to that consideration, we address post-trial processing standards in the military justice system. Our concern for post-trial timeliness has been heightened by the number of appellate delay cases that have come before this court and cases that are pending elsewhere in the military justice system. In recognition of the due process issues involved in timely post-trial review and appeal and in response to the cases giving rise to our concerns, we will establish post-trial processing standards to be applied to cases yet to enter the post-trial and appellate processes.

Post-Trial Processing Standards

In 1974 this court adopted a "presumption of a denial of speedy disposition of the case" if a convening authority failed to take action within ninety days of trial. *Dunlap*, 23 C.M.A. at 138, 48 C.M.R. at 754. Five years later this court abandoned that rule and expressed confidence that military justice had overcome the numerous circumstances giving rise to that rule:

> Dunlap came in response to a problem which frequently manifested itself where the convening authority delayed his final action. *See generally United States v. Jefferson*, 22 U.S.C.M.A. 554, 48 C.M.R. 39 (1973); *United States v. Gray*, 22 U.S.C.M.A. 443, 47 C.M.R. 484 (1973);

> *United States v. Timmons*, 22 U.S.C.M.A. 226, 46 C.M.R. 226 (1973); *United States v. Wheeler*, 21 U.S.C.M.A. 468, 45 C.M.R. 242 (1972); *United States v. Whitmire*, 21 U.S.C.M.A. 268, 45 C.M.R. 42 (1972); *United States v. Davis*, 20 U.S.C.M.A. 541, 43 C.M.R. 381 (1971); *United States v. Prater*, 20 U.S.C.M.A. 339, 43 C.M.R. 179 (1971). However, convicted service persons now enjoy protections which had not been developed when Dunlap was decided. For example, in *United States v. Palenius*, 25 C.M.A. 222, 2 M.J. 86, 54 C.M.R. 549 (C.M.A. 1977), we announced duties on the part of the trial defense attorney which are designed to insure a continuous, uninterrupted representation of the convicted accused service person. Performance of those functions may well remove the causes which concerned the Dunlap Court. And in *United States v. Brownd*, 6 M.J. 338 (C.M.A. 1979) we announced standards by which applications for deferment of sentence are to be judged in appropriate cases. Thus the serviceman awaiting final action by the convening authority may avail himself of remedies during the pendency of review which were not clear when Dunlap was decided.

United States v. Banks, 7 M.J. 92, 93 (C.M.A. 1979). *See also United States v. Kossman*, 38 M.J. 258, 261 (C.M.A. 1993) (eliminating the ninety-day rule for

bringing a servicemember to trial when that member is in pretrial confinement).

Unfortunately, our confidence that procedural protections would suffice to ensure the speedy post-trial and appellate rights of servicemembers has been eroded. It is of some concern that the Government brief asserts that the 1,688 day delay in this case was reasonable.[20] We reject that contention and note that Moreno's case is not an isolated case that involves excessive post-trial delay issues.[21]

This increase in processing time stands in contrast to the lower number of cases tried in the military justice system in recent years. Our separate system of military justice often provides different or diminished constitutional rights in light of the need for prompt disposition of disciplinary matters. It follows then, as this court has noted, that the unique nature of review under Article 66(c), UCMJ, "calls for, if anything, even greater diligence and timeliness than is found in the civilian system." *Diaz*, 59 M.J. at 39.

We believe that adopting the *Doggett* presumption of prejudice is unnecessary at this point. We can deter these delays and address the systemic delays we see arising in post-trial and

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[20] "The facts show the post-trial processing of Appellant's case has been reasonable, if not expeditious."

[21] *See United States v. Oestmann*, 61 M.J. 103 (C.A.A.F. 2005); *United States v. Jones*, 61 M.J. 80 (C.A.A.F. 2005); *Rodriguez-Rivera v. United States and The Judge Advocate General of the Navy*, 61 M.J. 19 (C.A.A.F. 2005); *United States v. Toohey*, 60 M.J. 100 (C.A.A.F. 2003); *Diaz*, 59 M.J. 34; *United States v. Tardif*, 57 M.J. 219 (C.A.A.F. 2002).

appellate processing through less draconian measures. *See Simmons*, 898 F.2d at 869. Although we do not foreclose the possibility that presumptions of prejudice may yet prove necessary, we do not believe it is necessary to adopt such a presumption at this juncture.

Nonetheless, some action is necessary to deter excessive delay in the appellate process and remedy those instances in which there is unreasonable delay and due process violations.[22] For courts-martial completed thirty days after the date of this opinion, we will apply a presumption of unreasonable delay that will serve to trigger the *Barker* four-factor analysis where the action of the convening authority is not taken within 120 days of the completion of trial. We will apply a similar presumption of unreasonable delay for courts-martial completed thirty days after the date of this opinion where the record of trial is not docketed by the service Court of Criminal Appeals within thirty days of the convening authority's action.

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[22] We are mindful of the importance of providing a deterrent to improper Government action, including actions that delay post-trial and appellate processing. One such very significant deterrent, the exclusionary rule, was developed to protect not only the constitutional rights of individuals accused of crime, but also the integrity of and respect for the criminal justice system. *See Mapp v. Ohio*, 367 U.S. 643, 655, 81 S. Ct. 1684, 6 L. Ed. 2d 1081, 86 Ohio Law Abs. 513 (1961). The exclusionary rule emphasizes that constitutional rights have meaning and a deprivation of those rights has ramifications. *See* Marc M. Arkin, Speedy Criminal Appeal: A Right Without A Remedy, 74 Minn. L. Rev. 437, 459-60 (1990).

For those cases arriving at the service Courts of Criminal Appeals thirty days after the date of this decision, we will apply a presumption of unreasonable delay where appellate review is not completed and a decision is not rendered within eighteen months of docketing the case before the Court of Criminal Appeals. These presumptions of unreasonable delay will be viewed as satisfying the first *Barker* factor and they will apply whether or not the appellant was sentenced to or serving confinement. It is important to note that the presumptions serve to trigger the four-part *Barker* analysis -- not resolve it. The Government can rebut the presumption by showing the delay was not unreasonable. By using these presumptions we trigger an appellate analysis and allocate the burden; we do not legislate or undermine the President's rulemaking authority under Article 36, UCMJ, 10 U.S.C. § 836 (2000).

Some cases will present specific circumstances warranting additional time, thus making those periods reasonable upon assessment of the *Barker* factors. But these must be justifiable, case-specific delays supported by the circumstances of that case and not delays based upon administrative matters, manpower constraints or the press of other cases. We expect convening authorities, reviewing authorities and the Courts of Criminal Appeals to document reasons for delay and to exercise the institutional vigilance that was absent in Moreno's case.

Once the four-factor analysis is completed and those factors balanced, reviewing authorities that find a denial of speedy post-trial or appeal "should

'tailor an appropriate remedy, if any is warranted, to the circumstances of the case.'" *Jones*, 61 M.J. at 86 (quoting *United States v. Tardif*, 57 M.J. 219, 225 (C.A.A.F. 2002)). The nature of that relief will depend on the circumstances of the case, the relief requested, and may include, but is not limited to: (a) day-for-day reduction in confinement or confinement credit; (b) reduction of forfeitures; (c) set aside of portions of an approved sentence including punitive discharges; (d) set aside of the entire sentence, leaving a sentence of no punishment; (e) a limitation upon the sentence that may be approved by a convening authority following a rehearing; and (f) dismissal of the charges and specifications with or without prejudice. Clearly this range of meaningful options to remedy the denial of speedy post-trial processing provides reviewing authorities and courts with the flexibility necessary to appropriately address these situations on a case-by-case basis.[23]

Those cases tried or received at a Court of Criminal Appeals prior to the date of this opinion and therefore not encompassed by the foregoing presumptions of unreasonable delay will continue to be reviewed on a case-by-case basis under the *Barker* due process analysis. Delays have been tolerated at all levels in the military justice system so much so that in many instances they are now considered the norm. The effect of this opinion is to provide notice

[23] Post-trial delay cases that arise in Article III courts do so in the context of a writ of habeas corpus with relief generally limited to dismissal of the charges. As we generally review the issue of post-trial delay on direct appeal, we have a number of remedies not available to Article III courts.

that unreasonable delays that adversely impact an appellant's due process rights will no longer be tolerated.

Relief in Moreno's Case

In Moreno's case, a rehearing is the appropriate remedy for the military judge's erroneous denial of the challenge for cause against LtCol F. In considering the range of options to address the denial of Moreno's due process right to speedy review and appeal, we considered directing a day-for-day credit for each day of unreasonable and unexplained delay. Such a credit would have no meaningful effect, however, as Moreno served the full term of adjudged confinement after his initial trial.

We have also considered dismissing the charge and specification with prejudice. Dismissal would be a consideration if the delay either impaired Moreno's ability to defend against the charge at a rehearing or resulted in some other evidentiary prejudice. *See Tardif*, 57 M.J. at 224 (citing *United States v. Timmons*, 22 C.M.A. 226, 227, 46 C.M.R. 226, 227 (1973); *United States v. Gray*, 22 C.M.A. 443, 445, 47 C.M.R. 484, 486 (1973)). We find no such evidence before us. Finally, because we must set aside the sentence in order to permit a rehearing, there is no direct sentence relief that we can afford to Moreno. Compare *Jones*, 61 M.J. at 86 (this court formulated a remedy for prejudicial denial of speedy appellate review where neither the adjudged sentence nor the convening authority's action were to be set aside).

We are not, however, without power to effect appropriate relief in this case. Should there be a rehearing resulting in a conviction and new sentencing, we believe that limiting the sentence that may be approved by the convening authority will adequately afford Moreno relief for the deprivation of his speedy appellate review due process rights.

DECISION

The decision of the United States Navy-Marine Corps Court of Criminal Appeals is reversed. The findings and sentence are set aside and a rehearing may be ordered. In the event that a rehearing is held resulting in a conviction and sentence, the convening authority may approve no portion of the sentence exceeding a punitive discharge.

CONCUR BY: CRAWFORD (In Part)

DISSENT BY: CRAWFORD (In Part)

DISSENT

CRAWFORD, Judge (concurring in part and dissenting in part):

I respectfully dissent because the majority: (1) usurps the role of Congress and the President, as delegated by Congress to the executive branch by Article 36, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 836 (2000), by establishing prospective rules setting forth timelines for the post-trial processing of cases in the military justice system; and (2) misapplies the speedy trial balancing factors

of *Barker v. Wingo*, 407 U.S. 514, 529-33, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972).

I agree with the majority that the military judge should have granted the challenge for cause, and thus concur in the result.

I. Separation of Powers

A. History

The wisdom of our Founding Fathers is reflected in the process and procedures they established in the Constitution. To prevent centralization of power, the Founding Fathers established three branches of government, each with its own rules, powers, and responsibility, and serving as a check on each other rather than one exercising the role of two branches of government. As James Madison said, "There can be no liberty . . . if the power of judging be not separated from the legislative and executive powers." The Federalist No. 47, at 302 (James Madison) (Clinton Rossiter ed., 1961). Accordingly, Madison cited the "oracle" Montesquieu for the admonition of our Founding Fathers that the "preservation of liberty requires that the three great departments of power should be separate and distinct." *Id.* No. 47, at 301 (James Madison). In separating the powers of the departments of the federal government, the Founding Fathers established a system of checks and balances "by so contriving the interior structure of the government as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places. *Id.* No. 51, at 320 (James Madison).

B. Congressional Delegation

Under Article 36, UCMJ, Congress has delegated to the President the power to prescribe rules for post-trial procedures. By establishing prospective rules setting forth timelines for post-trial processing, the majority assumes the role delegated to the President by Congress in Article 36, UCMJ, in contravention of the constitutional separation of powers doctrine.

In *Barker v. Wingo*, the Supreme Court rejected judicial rulemaking to specify a time period for when a defendant will be offered a trial. 407 U.S. at 523. The Court concluded that setting out a time period to identify when the speedy trial right has been infringed would require the Court "to engage in legislative or rulemaking activity, rather than in the adjudicative process to which [the Court] should confine [its] efforts." *Barker*, 407 U.S. at 523. The Court reasoned its "approach must be less precise" and that it should not establish procedural rules because there is "no constitutional basis for holding that the speedy trial right can be quantified into a specified number of days or months." *Id.* In creating specific timelines that, if violated, equate to unreasonable delay, the majority is essentially modifying the Rules for Courts-Martial (R.C.M.) and attempting to assume the role of the President in violation of separation of powers principles.

II. Post-Trial Delay

A. General

While the Supreme Court has not addressed the issue of whether the Constitution guarantees a right to a speedy appeal, the lower federal courts and this Court have. "The speedy trial guarantee of the Sixth Amendment applies only to proceedings in the trial court. Our sister circuits have held, however, that a similar guarantee applies to criminal appeals via the Due Process Clause." *United States v. Smith*, 94 F.3d 204, 206 (6th Cir. 1996) (citations omitted). The right to a speedy trial is guaranteed an accused by the Sixth Amendment. The Due Process Clause provides that "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. V. An appellant's right to a speedy appellate review evolves from an appellant's due process rights under the Fifth Amendment. *Harris v. Champion*, 15 F.3d 1538, 1558 (10th Cir. 1994). When examining these constitutional rights, we must look at the text, the history, the tradition behind the constitutional amendments, prior precedent, and practical consequences. *See County of Sacramento v. Lewis*, 523 U.S. 833, 857, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998) (must consider "history and tradition"); *United States v. Mara*, 410 U.S. 19, 37, 93 S. Ct. 774, 35 L. Ed. 2d 99 (1973) (must examine the teachings of history and tradition).

The federal courts have recognized that generally "there is no due process right to an appeal at all, but that an appeal must nonetheless comport with due process 'if a State has created appellate courts as an integral part' of its criminal justice system." *Smith*, 94 F.3d at 206-07 (quoting Harris, 15 F.3d at 1558)

(internal quotation marks omitted). The courts considering this issue have conducted a case-by-case basis analysis, applying a modified version of the four factors of *Barker* to determine whether the delay in an appeal violated an appellant's due process rights to a speedy post-trial review. These four factors are: (1) length of the delay; (2) reasons for the delay; (3) the appellant's assertion of his right to a timely appeal; and (4) prejudice to appellant. *Barker*, 407 U.S. at 529-33.

In *Barker*, the Supreme Court adopted a "balancing test" approach in evaluating these factors in speedy trial violations "in which the conduct of both the prosecution and the defendant are weighed." *Barker*, 407 U.S. at 530. The "balancing test necessarily compels courts to approach speedy trial cases on an ad hoc basis." *Id.* None of these four factors is "a necessary or sufficient condition to finding of a deprivation of the right of speedy trial." *Id.* at 533. Courts must engage in the "difficult and sensitive balancing process" of all of the factors in evaluating whether a post-trial delay violates an appellant's due process. *See id.* at 533.

In *Toohey v. United States*, 60 M.J. 100, 102 (C.A.A.F. 2004), this Court recognized that service members have a due process right to speedy appellate review and used modified *Barker* factors to evaluate whether appellate delay violates an appellant's due process rights. *See also Diaz v. Judge Advocate General of the Navy*, 59 M.J. 34, 37-38 (C.A.A.F. 2003) (service members have a right to have their cases reviewed in a timely fashion).

Courts have viewed appellate delays differently than trial delays. "Not every delay in the appeal of a case, even an inordinate one, violates due process." *Rheuark v. Shaw*, 628 F.2d 297, 303 (5th Cir. 1980). Most federal courts have not created a "benchmark" for triggering a presumption of prejudice. But *see Harris*, 15 F.3d at 1559-60 (Tenth Circuit has held that a two-year appellate delay will create a rebuttable presumption that the constitutional threshold has been crossed). *See also Barker*, 407 U.S. at 523 (Court specifically rejected establishing a specified time period to bring a defendant to trial). The federal courts evaluate the peculiar circumstances of each case to determine whether the length of the delay provokes a constitutional inquiry. "Unless there is a period of delay that appears, on its face, to be unreasonable under the circumstances, 'there is no necessity for inquiry into the other factors that go into the balance.'" *Smith*, 94 F.3d at 209 (quoting *Barker*, 407 U.S. at 530). "If the constitutional inquiry has been triggered, the length of delay is itself balanced with the other factors" in the *Barker* analysis. *Id.* In extreme circumstances, the length of delay may give rise to a strong "presumption of evidentiary prejudice" to a defendant's ability to defend himself at trial. *See Doggett v. United States*, 505 U.S. 647, 655-57, 112 S. Ct. 2686, 120 L. Ed. 2d 520 (1992).[1] But *see Smith*, 94 F.3d. at 212-13 ("We deem *Doggett* relevant, but

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[1] Under the *Doggett* presumption of prejudice analysis, if the delay triggers the *Barker* analysis, there is a presumption of prejudice and "the only question is how much 'importance' to assign to that prejudice." *Smith*, 94 F.3d at 212.

we hold that the presumption of prejudice, if any, in this case of three-year appellate delay has been clearly rebutted.") (emphasis added).

B. Applying the *Barker* Analysis to This Case

1. Length of the Delay

In this case, there has been delay of nearly 1,700 days between the completion of Appellant's court-martial and the Court of Criminal Appeals' decision. On its face, this delay is sufficient to trigger an inquiry using the *Barker* analysis.

2. Reasons for the Delay

Although there were significant delays at all phases of the post-trial process in this case, the greatest portion of that delay involves the period from when the case was docketed at the Court of Criminal Appeals until the briefing was complete. It is the majority's conclusion regarding this period of delay with which I have the greatest disagreement. The appellate defense counsel requested and was granted eighteen enlargements of time in which to file a brief. The reason stated for enlargements four through eighteen was "other case load commitments." The majority refuses to hold Appellant accountable for any portion of this delay even though neither Appellant nor his defense counsel requested assistance within the appellate division or outside the appellate division from outside contractors or other services' appellate divisions to process this appeal. Despite the lack of a request for assistance because of "case load

commitments," incredibly, the majority concludes "there was no evidence demonstrating that the enlargements were directly attributable to Moreno."

In my view, unless the appellate defense counsel was ineffective or was acting unethically or outside the scope of his authority, the actions he took to obtain additional delays in the filing of the appellate briefs were performed for and on behalf of Appellant. Presumably, appellate defense counsel filed requests for delays with the knowledge of Appellant because a reasonably effective counsel would have communicated with his client. The majority ultimately lays the blame for the delay at the feet of the Court of Criminal Appeals. It holds that regardless of the appellate defense counsel's case load problems, the Courts of Criminal Appeals are responsible for the "timely management and disposition of cases docketed at the Courts of Criminal Appeals."

This case reinforces the wisdom of the federal and state courts placing the burden on Appellant to show prejudice. There are a number of questions to be asked of defense counsel -- What other cases did you have? How did you stagger them? Did you prioritize the cases? What issues were present? What were the difficulties in contacting Appellant? Was there a conflict in Appellant's wishes and your desires? Did you request assistance from your supervisor?

The Government is simply not in a position to answer questions as to why the defense counsel asked for extended delays. *See United States v. Lewis*, 42 M.J. 1 (C.A.A.F. 1995). Nor can the

Government answer questions regarding the impact of the requested delays on the strategy, theories, or theme of the defense. Yet, contrary to the prevailing jurisprudence of federal and state courts, the majority relieves Appellant from his burden of demonstrating actual prejudice and incredibly shifts the responsibility for the delay to the Government. Thus, the majority has created an incentive for the defense to request enlargements knowing they will not be asked these questions absent a court order.

Delay must be examined on the basis of the facts in a specific case and not based on the length of delay alone. In fact, merely asking for numerous delays has ended up benefiting Appellant. Based on the majority decision, I predict that appellate courts will receive many more requests for enlargements from appellate defense counsels in order to get the benefit of the presumption of unreasonable delay in a speedy appellate review scenario. It is incredible that while recognizing this lengthy period of time is attributable to the appellate defense counsel's requests for delay, the majority declines to hold Appellant accountable for any of it.

3. Appellant's Assertion of His Right to a Timely Appeal

Appellant never asserted a post-trial speedy review right or protested the length of delay in his case. While the demand rule is not conclusive in the speedy trial or appellate review context, it is extremely important in evaluating the length and reason for the delay as well as whether there is any personal prejudice. *Barker*, 407 U.S. at 531. A

complaint or protest would have at least indicated to the appellate court that Appellant was dissatisfied with the pace of his appeal. The determination of whether an appellant asserts his right to a speedy post-trial review is "entitled to strong evidentiary weight in determining whether [an appellant] is being deprived of the right." *Id.* at 532-33. The "failure to assert the right will make it difficult for [an appellant] to prove he was denied a speedy trial" review. *Id.* at 532.

This factor becomes more significant when there are a number of options open to counsel and an appellant to complain about the delay. These options could ensure expediting the appeal to avoid any possible violation of post-trial delay. In this case, there is no indication that Appellant made efforts to prod appellate defense counsel or anyone else to expedite his appeal. Yet the majority shifts the responsibility for the entire period of delay onto the Government in spite of the requests for delay by Appellant through his appellate defense counsel.

What is the Government to do? Oppose defense requests for delay because the delay will be attributed to it? Should the Courts of Criminal Appeals deny defense requests for delays for fear the delays will be attributed to it or the Government? What is next? Will we begin to see appellate defense counsel raise the issue that an appellant was denied an opportunity to present his case on appeal because his reasonable request for a delay for filing his brief was denied?

Although the Supreme Court rejected the rule that a "defendant who fails to demand a speedy trial forever waives his right," the Court did state that "this does not mean, however, that the defendant has no responsibility to assert his right." *Barker*, 407 U.S. at 528. The principle set out in *Barker* is that an appellant's "assertion of or failure to assert his right to a speedy trial is one of the factors to be considered in an inquiry into the deprivation of the [speedy trial] right." *Id.* at 529. The application of this formula allows the courts judicial discretion based on the circumstances as opposed to the application of some rigid rule that does not provide for consideration of the circumstances of the case. In its opinion, the majority in effect overlooks any application of this factor to the facts of this case even though it is a factor in the *Barker* analysis. Thus, I disagree with the majority and the weight, or lack thereof, they give to the absence of an assertion of the right to a speedy post-trial review.

4. Prejudice to Appellant

With respect to assessing the fourth factor -- prejudice -- the Supreme Court provided further guidance. Prejudice should be evaluated "in the light of the interests of defendants which the speedy trial right was designed to protect." *Barker*, 407 U.S. at 532. The interests are:

> (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be

> impaired. Of these, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system.

Id.

Lower courts applying the *Barker* test to appellate delay have adapted the prejudice factors to fit the circumstances of convicted parties on appeal: "(1) prevention of oppressive incarceration pending appeal; (2) minimization of anxiety and concern of those convicted awaiting the outcome of their appeals; and (3) limitation of the possibility that a convicted person's grounds for appeal, and his or her defenses in case of reversal and retrial, might be impaired." *Harris*, 15 F.3d at 1559 (quoting *Rheuark*, 628 F.2d at 303 n.8).

a. Prevention of Oppressive Incarceration Pending Appeal

Generally, incarceration will be considered "oppressive" if an appellant is confined while the appeal is pending and the substantive appeal is meritorious. *See Cody v. Henderson*, 936 F.2d 715, 719-21 (2d Cir. 1991). In this case, the meritorious issue addressed by the Court concerns the denial of a challenge for cause against a court member. There were no successful issues regarding the sufficiency of evidence or the admissibility of evidence. Theoretically, the Government will be able to use the same evidence used at the original trial to retry Appellant. There is no way, based on the facts and evidence in this case, to conclude that Appellant's incarceration was oppressive or out of the ordinary

for a person convicted of an offense and sentenced to confinement.

Furthermore, Appellant was sentenced to six years of confinement. The majority, without any documentary evidence on which to rely, theorizes that Appellant was released from confinement after about four years of confinement. Assuming the majority is correct, apparently the delay in the appeal of Appellant's case did not affect his ability to obtain a minimum release date and to be released from confinement when that date was reached. Without knowing the outcome of the retrial, it is only supposition as to whether Appellant's incarceration was excessive or oppressive.

b. Minimization of Anxiety and Concern While Awaiting Outcome of Appeal

I agree with the majority that "the appropriate test for the military justice system is to require an appellant to show particularized anxiety or concern that is distinguishable from the normal anxiety experienced by prisoners awaiting an appellate decision" and that the anxiety is not "dependent upon whether his substantive appeal is ultimately successful." I disagree with the majority's conclusion that Appellant's anxiety was "distinguishable" because he had to register as a sex offender upon his early release from confinement. This consequence of Appellant's conviction has been deemed a collateral consequence of a conviction by numerous courts and will not generally merit relief in those situations where an appellant proceeds to trial without knowledge of such a consequence. *See State v.*

Young, 112 Ariz. 361, 542 P.2d 20 (Ariz. 1975); *Ray v. State*, 133 Idaho 96, 982 P.2d 931 (Idaho 1999); *State v. Schneider*, 263 Neb. 318, 640 N.W.2d 8 (Neb. 2002); *Davenport v. State*, 2000 ND 218, 620 N.W.2d 164; *Mitschke v. State*, 129 S.W.3d 130 (Tex. Crim. App. 2004); *State v. Bollig*, 2000 WI 6, 232 Wis. 2d 561, 605 N.W.2d 199; *State v. Ward*, 123 Wn.2d 488, 869 P.2d 1062 (Wash. 1994); *Johnson v. State*, 922 P.2d 1384 (Wyo. 1996).

How the majority can now classify a sex offender registration requirement as "distinguishable" anxiety is beyond comprehension. The record contains no information concerning the requirements for sexual offender registration in the state of California where Appellant resides, and what, if anything, will happen regarding the registration requirement for Appellant after the findings in his case are set aside and he is awaiting a new trial. The majority simply latches on to the assertion in Appellant's brief that he had to register as a sex offender upon his release from confinement without any proof of registration or what the effects of setting aside the conviction and retrying Appellant would have on that requirement.

c. Limitation of Appellant's Grounds for Appeal or Defenses at Retrial

The most serious factor in analyzing the prejudice factor is evaluating the ability of an appellant to assert: (i) his or her arguments on appeal; and (ii) his or her defense in the event of retrial or resentencing. *See Barker*, 407 U.S. at 532; *Harris*, 15 F.3d at 1563. *See also Smith*, 94 F.3d at 211 (question is whether

the delayed ruling by the appellate court actually preserved any arguments the appellant would have asserted on retrial or resentencing and whether Appellant's ability to assert these arguments was affected).

In this case, Appellant failed to establish any harm to his ability to present a defense or retry his case.[2] The substantive issue raised by Appellant related to the military judge's denial of a challenge for cause against a panel member. It was a technical issue and did not relate to the presentation of the facts, the evidence, or defenses at trial. There is no danger to any of his potential arguments or ability to present a defense. At a retrial, the court member issue in this case will be cured.

As to prejudice generally, one must recognize the difference between pretrial delay prejudice and post-trial delay prejudice. Pretrial delay prejudice involves planning a defense at trial with live witnesses who may not have committed their testimony either to an oral or written form. "When a full trial has occurred, even if there is an inordinate post-trial delay, the record of trial is preserved" and an appellant must make some showing of prejudice to establish a due process violation. *Latimore v. Spencer*, 994 F. Supp. 60, 71 (D. Mass. 1998). In post-trial delay cases, there has been a conviction.

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[2] The majority acknowledges that Appellant failed to "identify any specific harm that he would encounter at a rehearing" and that he "failed to establish prejudice under this sub-factor."

Thus, the same anxiety that might occur in a pretrial scenario does not occur to the same extent in the post-trial scenario because the defendant is no longer cloaked with the presumption of innocence. Likewise, the concern that pretrial delay may affect the defendant's ability to mount a defense because memories will dim or witnesses will become unavailable is not a concern with post-trial delay.

In the post-trial scenario, the defendant has been convicted after a full-fledged adversary proceeding and is given a complete verbatim copy of the record, together with appointed counsel and a right to appeal the case when the sentence extends to one year of confinement and/or a punitive discharge. Appellate review of military cases is much broader than in the civilian sector because the intermediate civilian appellate court has no factfinding capability. This procedure is essential because it allows defendants to have a fair chance to present persuasive arguments during the appellate process.

Appellate defense counsel have at their disposal the means of identifying any prejudice that might otherwise arise from the passage of time. If witnesses are not available, their former testimony can be introduced under Military Rule of Evidence (M.R.E.) 804(b)(1) and M.R.E. 801(d)(1)(A) and (B) or M.R.E. 803(5). Likewise, if memories fade, they can be refreshed under M.R.E. 612. If there is a change in testimony, the parties have a right to impeach the witness. M.R.E. 613. This verbatim record obviates most of the problems of retrials. Absent a showing at a *United States v. DuBay*, 17 C.M.A. 147, 37 C.M.R. 411 (1967), or motion hearing that Appellant is

unable to present a defense, or collect exculpatory evidence as a result of the excessive delay, the charges should not be dismissed. *See also State v. Hall*, 145 Vt. 299, 487 A.2d 166 (Vt. 1984) (defendant has burden of showing substantial prejudice because of the delay).

The most problematic aspect of the majority's opinion is its application of the *Barker* prejudice factor. Appellant and the majority in this case merely speculate as to the potential harm. Rather than placing the burden on Appellant to show prejudice, the majority is intent on placing the responsibility for the delay on the Courts of Criminal Appeals. According to the holding of the majority, the Courts of Criminal Appeals have the responsibility for "the timely management and disposition of cases" regardless of whether an appellant in fact suffers prejudice as a result of post-trial delay, whether an appellant makes efforts to foster the delay, or does nothing to assert his right to a speedy review. The prejudice factor is the most critical factor in evaluating whether Appellant's due process right to a speedy appellate review has been violated, yet the majority gives this factor short shrift. I would conclude that Appellant has not met his burden to demonstrate actual prejudice by this post-trial delay.

III. The Reality of the Application of the Majority's Specified Time Period

The majority does not adopt a "presumption of prejudice" but a prospective "presumption of unreasonable delay" if certain timelines are not met. The majority sets forth a "presumption of

unreasonable delay" to be triggered by the following events:

(1) No action by convening authority within "120 days of the completion of trial";

(2) Case not docketed with the service Court of Criminal Appeals within "thirty days" of convening authority's action; and

(3) No decision by the service Court of Criminal Appeals rendered within "eighteen months of docketing the case."

Once the timeline is violated, the "presumption of unreasonable delay" will exist, which will satisfy the first *Barker* factor regardless of whether an appellant is sentenced to or serving confinement. The timeline violation will then trigger the *Barker* four-factor analysis. Any delay beyond the time periods established must be "justifiable, case-specific delays supported by the circumstances of that case and not delays based upon administrative matters, manpower constraints or the press of other cases."

The majority stands presumptions on their heads, failing to appreciate which party has the privileged information. By shifting the responsibility to the Government rather than requiring an appellant to demonstrate actual prejudice, the Court overlooks that the evidence of prejudice is peculiarly within an appellant's control. Raising denial of due process because of appellate delay does not constitute the waiver of the attorney-client privilege and therefore puts the Government in a very awkward position.

This is why federal and state courts have placed the burden on the appellant to show actual prejudice.[3] [3]

The majority has established a nonexclusive list of potential remedies for those situations where a reviewing court determines there is a denial of speedy post-trial or appellate review. The remedy is supposed to be tailored to the circumstances of the case:

> The nature of that relief will depend on the circumstances of the case, the relief requested, and may include, but is not limited to: (a) day-for-day reduction in confinement or confinement credit; (b) reduction of forfeitures; (c) set aside of portions of an approved sentence including punitive discharges; (d) set aside of an entire sentence, leaving a sentence of no punishment; (e) a limitation upon the sentence that may be approved by a convening authority following a rehearing; and (f) dismissal of the charges and specifications with or

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[3] The Georgia Supreme Court recently concluded:

> Prejudice necessary to establish a due process violation based on post-conviction direct appeal delay is prejudice to the ability of the defendant to assert his arguments on appeal and, should it be established that the appeal was prejudiced, whether the delay prejudiced the defendant's defenses in the event of retrial or resentencing.

Chatman v. Mancill, 280 Ga. 253, 626 S.E.2d 102, 109-10 (Ga. 2006). *See also Lopez v. State*, 105 Nev. 68, 769 P.2d 1276, 1288-89 (Nev. 1989).

> without prejudice. Clearly this range of meaningful options to remedy the denial of speedy post-trial processing provides reviewing authorities and courts with the flexibility necessary to appropriately address these situations on a case-by-case basis.

Certainly, it is a much more cumbersome and time-consuming process to try a case, transcribe a record, have counsel,[4] the military judge, the staff judge advocate, and the convening authority review the records of trial, have the convening authority take action on the case, and then, make the requisite number of copies of the record and exhibits to forward to the Courts of Criminal Appeals than it is for an appellate court to review a completed record and consider and decide the issues raised. Yet, the majority has set out an arbitrary timeline for the post-trial processing of a case in the field without regard to the complications and complexity of the case and the realities of today's mobile, deployed forces.

The majority, who does not suffer the same complications and complexities of those in the field,

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[4] Pursuant to R.C.M. 1105(c)(1), an accused has ten days upon service of the authenticated record of trial or the staff judge advocate's recommendation to submit matters for consideration. This time period may be extended for an additional twenty-day period. If the staff judge advocate's addendum contains new matter, then the accused is entitled to another ten days to respond. The process of post-trial submissions by the defense generally will consume at least thirty to forty days of the 120-day time limit set by the majority.

and who receives the benefit of receiving a completed, typed record to review, has provided that those individuals in the field should have essentially five months to get a completed record to the service courts for docketing. Then, the majority provides the Courts of Criminal Appeals with eighteen months from docketing to completion of review. This Court has not always followed its own standard of completing review within eighteen months. I suggest that if we are going to set up rules, the rules might apply to ourselves as well.

The Court's master docket reveals that as of February 7, 2006, there were three cases over 1,000 days old, which is more than the eighteen-month standard set out by the majority for the Courts of Criminal Appeals to issue opinions. There were also more than thirty cases in which the petition had been granted and no action had been taken for over 400 days, which is more than the eighteen-month standard set out by the majority for the Courts of Criminal Appeals to issue opinions. Additionally, there were more than twenty-four cases where petitions had been pending for over eighteen months in which no action had been taken on the petition.

My purpose in mentioning these delays is not to be critical of this Court, but rather to underscore that there are valid reasons for the length of time it takes to conduct a thorough appellate review of a case whether it be before this Court or a Court of Criminal Appeals.[5] Many cases are very complex

[5] Each case must be evaluated for "unreasonable" post-trial delay based on the facts and circumstances of the case and not

and case load commitments of counsel are often legitimate reasons to seek enlargements of time in order to represent one's client adequately and ethically. Let me be very clear that I do not condone many of the delays we have encountered in the military justice system, including the delay in this case. I share the concerns of the majority and urge the appropriate legislative and executive branch officials to take all necessary steps to address resource and other issues that impact on the efficient and timely processing of cases for appellate review. I do not, however, believe justice is served by overstepping our judicial role and establishing timeline rules, albeit cloaked in the guise of presumptions, for the post-trial processing of cases.

The majority acknowledges in its opinion that timelines in the past have not worked, but yet they plug ahead establishing such rules.[6] We are not a rulemaking body and, if we were, we should not adopt a bright-line rule unless it would approximate a correct result. These rules will not solve the problem and will cause considerable anxiety among those who have to do the yeoman's work of getting

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some arbitrary timeline imposed by an appellate court.

[6] *See United States v. Burton*, 21 C.M.A. 112, 118, 44 C.M.R. 166, 172 (1971) (establishing a three-month rule for a pretrial delay), modified by *United States v. Driver*, 23 C.M.A. 243, 246, 49 C.M.R. 376, 379 (1974)(explicitly changing the rule from "three months" to "ninety days"); *Dunlap v. Convening Authority*, 23 C.M.A. 135, 138, 48 C.M.R. 751, 754 (1974) (establishing a ninety-day rule for a post-trial delay). *But see United States v. Kossman*, 38 M.J. 258, 261 (C.M.A. 1993) (overruling Burton and Driver); *United States v. Banks*, 7 M.J. 92, 93-94 (C.M.A. 1979) (overruling Dunlap).

the record to the appellate courts. I also believe that, in the haste to meet these arbitrary timelines, we will see more errors or mistakes in the post-trial processing and in the appellate review of cases, poorly constructed records of trials, and even the trampling of the rights of the accused. We have already seen situations where appellate defense counsel, in an attempt to move cases along, file pleadings before giving their clients a reasonable opportunity to raise issues with them and the appellate courts.

In evaluating what remedy it should grant in regard to the lengthy post-trial delay in this case, the majority looks at potential remedies without considering the seriousness or the nature of the offenses involved. I respectfully dissent from the majority's conclusion of a violation of Appellant's right to a speedy post-trial review absent a showing of actual prejudice to the findings or sentence by Appellant. It is not enough for an appellant to claim anxiety as to the outcome of the appeal. *See People v. Missouri*, 100 Mich. App. 310, 299 N.W.2d 346, 352-53 (Mich. Ct. App. 1980). Even in the pretrial scenario, it has been held that a ten-year delay does not create a presumption of prejudice. *See, e.g., United States v. Mohawk*, 20 F.3d 1480, 1488 (9th Cir. 1994). There must be a showing of actual prejudice.[7]

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[7]*See, e.g., Elcock v. Henderson*, 28 F.3d 276, 279 (2d Cir. 1994) (absent showing actual prejudice, no violation of due process for eight-year delay between conviction and appeal); *Heiser v. Ryan*, 15 F.3d 299, 303-04 (3d Cir. 1994) (absent actual prejudice thirteen-year delay was not a violation of due

IV. Conclusion

This Court is not a rulemaking body. Attempts at rulemaking in the past have proven to be unworkable, and we should not venture into that area again. The Court should leave the rulemaking function where it belongs -- to the executive and legislative branches. If the facts of this case establish a violation of the Appellant's right to a speedy post-trial review upon applying the *Barker* test, then so be it. But, this Court should not create rules that exceed the bounds of the separation of powers doctrine, and that will not accomplish the desired result.

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process); *United States v. Alston*, 412 A.2d 351, 361-62 (D.C. 1980) (must show actual prejudice); *State v. Chapple*, 135 Ariz. 281, 660 P.2d 1208 (Ariz. 1983) (*en banc*) (must show actual prejudice).